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In The

SUPREME COURT OF THE UNITED STATES

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October Term, 1954

No. 656

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CITY OF HASTINGS, NEBRASKA, PETITIONER,

V.

FEDERAL POWER COMMISSION and KANSAS NEBRASKA NATURAL GAS COMPANY (Intervenor), RESPONDENTS.

—::—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

—::—

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INDEX

Subject Index

Opinions below 1
Jurisdiction 2
Question presented 2
Statute involved 2
Statement 3
Reasons for granting the writ 7
Conclusion 10
Appendix 11
Opinion and judgment below 11
Dissenting opinion 28
Order and opinion of F. P. C. 34
Dissenting opinion 45

Citation

Natural Gas Act, 15 U. S. C. Sec. 717(b) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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The City of Hastings, Nebraska, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on December 16, 1954.

CITATIONS TO OPINIONS BELOW.

The Federal Power Commission order and opinion are reported in — F.P.C. —, 98 P.U.R. (N.S.) 1 and

is printed in the Appendix hereto, infra, p. 34. The opinion of the Circuit Court of Appeals, not yet appearing in official report, is printed in the Appendix hereto, infra, p. 11.

JURISDICTION.

The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1) and pursuant to Supreme Court Rule 19.

QUESTION PRESENTED.

Whether Federal Power Commission jurisdiction attaches to the entire quantity of natural gas sold by Kansas-Nebraska Natural Gas Company to the City of Hastings under a contract demand form of rate for resale to customers of the City, notwithstanding the fact that some of such gas, subsequent to acquisition by the City at town border stations, is actually consumed by the City power plant at times when such gas is not required to meet the demands of resale customers of the City.

STATUTES INVOLVED.

The Natural Gas Act appears in 15 U.S.C., Sections 717-717 w. The judgment, review of which is hereby sought, specifically involves an interpretation of Section 1(b) of the act which provides, in part, as follows:

> " 'The provisions of this Act shall apply * * * to the sale in Interstate Commerce of Natural Gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, * * * but shall not apply to any other * * * sale of natural gas * * *.' (52 Stat. 821; 15 U.S.C., Sec. 717)."

STATEMENT.

Herein the City of Hastings, Nebraska, is sometimes referred to as "City", Kansas-Nebraska Natural Gas Company is sometimes referred to as "Kansas-Nebraska" and Federal Power Commission is designated "Commission".

The City of Hastings, Nebraska, is a municipal corporation, and Kansas-Nebraska Natural Gas Company is a pipeline company and is a natural gas company, within the meaning of the Natural Gas Act. (See 52 Stat. 821, Sec. 2(6); 15 U.S.C. 717(a)(6).

In the presentation of this case to the Court of Appeals for the District of Columbia Circuit, pertinent portions of the record before the Commission were set forth in a Joint Appendix. The Joint Appendix shows the original record pagination; however, for the purpose of this petition, references to the record will be made only in terms of the appropriate Joint Appendix pages.

Chronology of Events.

Prior to 1947 the City of Hastings operated a gas distribution system within the City and its environs, and purchased gas for resale, from Kansas-Nebraska, under a town border contract providing a "commodity" type of rate (JA143). During that period the City purchased gas under another contract for use in the City's power plant (JA131, et seq.).

All of the gas purchased by the City under both contracts was delivered in bulk to the City at its town border stations in one commingled mass.

On October 1, 1947, Kansas-Nebraska filed with the Federal Power Commission a new town border contract containing a new Rate Schedule G-1 effective on that date which contained the following exclusionary language:

> "This rate schedule shall not apply to gas used or consumed by the utility (or any of its departments) for industrial purposes." (JA97,98,131-133).

This Rate Schedule established the "Contract Demand" form of rate hereafter discussed.

After much objection, on April 12, 1948, the City signed the town border contract for service under Rate Schedule G-1 (JA132) in reliance upon the Federal Power Commission's letter of March 26, 1948, which said in part:

> "* * * signing the contract does not preclude the subsequent filing of complaints, or the subsequent modification of any provision which could be proved to be unreasonable and over which the Commission has jurisdiction." (JA66)

On June 18, 1948, a new contract for power plant gas was executed by Kansas-Nebraska and the City (JA132).

The City and Kansas-Nebraska have stipulated:

> "The written 'gas sales contract' dated June 18, 1948, (the contract for the purchase of gas for the power plant) is claimed to have been terminated by the City as of December 1, 1949, and is admitted by the Company to have been terminated as of July 1, 1950."

Thereafter, the City contends that it has served the power plant, on an interruptible basis, when firm

customers did not require all available gas, with gas purchased under the town border contract (JA132, 42-44).

The Contract Demand Form of Rate.

This controversy arose primarily because of the adoption by Kansas-Nebraska of the contract demand form of rate. While the parties operated under a "commodity" rate (which did not involve a demand charge — JA3), the problems which are here involved did not exist.

Expert testimony established that under the contract demand form of rate the burden of determining the probable maximum daily consumption is imposed upon the distributing utility, which is required to "nominate" the maximum amount of gas it might wish to take in any day. This is called the "Contract Demand." Thereafter it pays a demand charge based upon this figure, or upon an increased figure established if the nominated contract demand is exceeded. The pipeline company has no obligation to supply more than the nominated contract demand.

Thus the distributor is required under this form of rate to nominate a contract demand which will provide sufficient gas for firm customers on a day of extreme minimum temperature or a "peak day." Such a day will seldom occur, and on other days, the distributor must pay the demand charge for gas which it cannot sell, unless it has interruptible customers, who are served only when firm customers do not take all the contract demand. Providing service to interruptible customers produces a better load factor, and benefits not only the distributor, but the pipe line company.

The Sale of Gas Under Rate Schedule G-1.

Rate Schedule G-1, which established a contract demand form of rate, and which contains the exclusionary language about which the City complains, is found in the Joint Appendix, page 97, et seq.

The Rate Schedule provides that after delivery at the town border station the City shall have sole responsibility and liability for the gas (JA107-109).

Kansas-Nebraska contracts to furnish gas up to the amount of the contract demand, but assumes no obligation to deliver more than that amount (JA97, 98,113,114).

Payment for gas is computed in two parts:

1) The demand charge of five cents per thousand cubic feet per day, computed from the amount of gas used, *but in no case less than 80% of the Contract Demand.*

2) The commodity charge of fifteen cents per thousand cubic feet actually delivered (JA98).

The Contract Demand is the greatest amount of gas delivered in any one day, except that the initial Contract Demand was a figure agreed upon by the parties. Further, the Contract Demand may be increased by agreement (JA97-100).

In February, 1949, a contract demand of 12,000,000 cubic feet was nominated (JA4) effective December 1, 1949.

The contract demand nominated by the City is based solely upon the needs of firm gas customers,

without any consideration being given to the possible use of some gas at the City power plant (JA4). All gas purchased by the City from Kansas-Nebraska is delivered at town border stations, at which time and place the City acquires title to the gas and assumes full control over and responsibility therefor. At the time such gas is delivered to the City it is an indistinguishable mass and it is not known at such time by whom the gas will be consumed ultimately (JA5,6).

REASONS FOR GRANTING THE WRIT.

The City of Hastings contends that the Federal Power Commission has jurisdiction over sales of gas to the City, under its town border contract, some of which gas may be used in the City's power plant, for the reasons that:

1) The City is required by the town border contract covering gas sold to it by Kansas-Nebraska Natural Gas Company, for resale, to nominate a "contract demand", being the probable maximum volume of gas to be used in one day, and to pay a charge which is computed from this contract demand, whether any gas is actually used or not. This contract demand is determined with reference to the needs of the City's firm resale customers, and not by any possible use in the power plant.

2) All gas delivered to the City is delivered in one bulk delivery at town border stations outside the city limits, and at that point the City acquires full title to, control over, and responsibility for the gas, which cannot then be earmarked for any particular customer or use. The gas enters the City's distribution system, from which it is withdrawn by consumers as they need it.

3) All gas is purchased for the purpose of resale to firm customers, and only when those customers do not require all of the gas is any used in the power plant, which is served on an interruptible basis, and has no right to demand or expect continuous service. At times, no gas is delivered to the power plant.

4) No separate contract for the purchase of power plant gas existed between the City and Kansas-Nebraska when this litigation was started, a previous contract having been admittedly terminated prior thereto. Such previously existing contract was entered into only after assurance by the Commission that relief could be obtained from it despite the execution of such contract.

5) Congress intended that all wholesale sales of gas by a producing company to a distributing company should be subject to the jurisdiction of the Federal Power Commission.

6) Upon substantially the identical facts here existing, the Commission and the courts have found that sales of gas, part of which was in fact used and not resold, were sales for resale in their entirety and not sales for use, and were within the Commission's jurisdiction.

This litigation was commenced on September 20, 1952, by the filing of the complaint of the City with the Commission (JA122). On February 5, 1953, the Commission issued its opinion and order dismissing the complaint for want of jurisdiction (JA129). Thereafter the matter was presented to the United States Court of Appeals for the District of Columbia Cir-

cuit for review; which court, on December 16, 1954, affirmed the order of the Commission (App. 12).

The effect of the decision of the lower court herein is to give countenance to the theory that the jurisdiction of the Commission in regard to natural gas sales is to be determined by the ultimate use to which the gas, or any part thereof, may be put. This so-called "end use" theory has been advanced on other occasions, and has been uniformly rejected. In other cases it has been demonstrated that a part of the gas or power involved was actually used for purposes other than resale, yet it has been determined that the Commission had jurisdiction over the entire volume of gas or power, including that which was not resold. It is the circumstances attending the initial purchase and acquisition of the gas by the City which determines whether the transaction is one subject to Commission jurisdiction. The existence of jurisdiction is not retroactively affected by the fact that ultimately a part of the gas may be consumed by the City, rather than resold; nor is the result altered by reason of the fact that the quantity of gas consumed by the City is or is not capable of precise calculation at some time subsequent to the initial purchase and acquisition.

The only question here involved is whether the Commission has jurisdiction, as the complaint of the City was dismissed for lack of jurisdiction. The merits of the complaint are not before the court for determination at this time.

Both the Commission and the Court of Appeals were divided in their decisions herein. Commissioner Bu-

chanan dissented from the Commission's denial of jurisdiction (App., p. 45). Similarly, Judge Fahy dissented from the decision of the Court of Appeals upholding the Commission ruling (App., p. 28). Undeniably compelling reasons in support of the existence of jurisdiction are advanced in each of these dissents. Any elaboration upon these dissents would be presumptous and totally unnecessary. We rest our prayer upon the reasoning and authorities contained therein.

The Commission has heedlessly and and without authority chosen to divest itself of jurisdiction over a vitally important area of the field entrusted to it by the Congress. We are confident that this court will not give sanction to such a surrender.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11824

CITY OF HASTINGS, NEBRASKA, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT,

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., INTERVENOR.

On Petition for Review of an Order of the Federal Power Commission

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Decided December 16, 1954

Messrs. Albert P. Madgett and *Lloyd J. Marti*, with whom *Mr. Sherman E. Burt* was on the brief, for petitioner.

Mr. Reuben Goldberg, Attorney, Federal Power Commission, with whom *Messrs. Willard W. Gatchell*, General Counsel Federal Power Commission, and *Abraham R. Spalter*, Attorney, Federal Power Commission, were on the brief, for respondent.

Mr. Oscar Cox, with whom *Messrs. Ezekiel G. Stoddard* and *Donald F. Turner* were on the brief, for intervenor.

Before WILBUR K. MILLER, FAHY and DANAHER, Circuit Judges.

DANAHER, *Circuit Judge:* The City of Hastings, Nebraska (hereinafter called City) seeks review of an "Opinion and Order" of the Federal Power Commission (hereinafter called Commission) dismissing the City's complaint against Kansas-Nebraska Natural Gas Company, Inc. (hereinafter called Kansas-Nebraska). The Commission decided it lacked jurisdiction after determining that the sale of gas used in the City's power plant was a transaction separate from and not part of a "sale for resale" of gas purchased under a town-border resale rate schedule which contained an exclusionary clause reading in part: "This rate schedule . . . shall not apply to gas used or consumed by [the City] for industrial purposes." In its Opinion and Order the Commission found that the natural gas consumed in the City's power plant was a direct sale for the City's own use, and hence not within Section 1(b) of the Natural Gas Act[1] which provides in part: "The provisions of this Act shall apply . . . to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial or any other use, . . . but *shall not apply to any other . . . sale of natural gas . . . .*" (Emphasis supplied.)

Kansas-Nebraska is a natural-gas company within the meaning of Section 2(6) of the Natural Gas Act.[2] Its sales for resale come squarely within the Commission's regulatory authority but excluded therefrom are direct sales, even by a natural-gas company, which are primary sales for use or consumption by the purchaser. "By the statute, Commission jurisdiction extends to 'sales for re-

[1] 52 Stat. 821 et seq. (1938), as amended, 15 U.S.C. §717 et seq. (1952).

[2] 52 Stat. (1938), 15 U.S.C. § 717a(6) (1952).

sale,' 'but not to any other sale'. . . The problem then, ...is to decide just what . . . transaction falls within this category of 'sale for resale'. . . ." *United States* v. *Public Utilities Commission of California,* 345 U. S. 295, 317 (1953). A few years earlier the Court had considered the nature of the "problem" and then said: "The omission of any reference to other sales, that is, to direct sales for consumptive use, in the affirmative declaration of coverage was not inadvertent. It was deliberate. For Congress made sure its intent could not be mistaken by adding the explicit prohibition that the Act 'shall not apply to *any other . . . sale . . . .*' Those words plainly mean that the Act shall not apply to any sales other than sales 'for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.' Direct sales for consumptive use of whatever sort were excluded.

"The line of the statute was thus clear and complete. It cut sharply and cleanly between sales for resale and direct sales for consumptive use. No exceptions were made in either category for particular uses, quantities or otherwise. And the line drawn was that one at which the decisions had arrived in distributing regulatory power before the Act was passed." *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana,* 332 U. S. 507, 516-7 (1947). This was "unusual legislative precision," *Id.* at 517, in an Act "drawn with *meticulous regard* for the continued exercise of state power . . . ." *Id.* at 517-8. (Emphasis supplied). Thus spoke the Court where a natural-gas company made direct sales for industrial consumption which were held subject to state—not federal regulation. "Three things *and three only* Congress drew within its own regulatory power delegated by the Act to its agent, the Federal

Power Commission." *Id.* at 516. (Emphasis supplied.) There would seem to remain no doubt that "Direct sales for consumptive use were designedly left for state regulation." *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 334 (1951).

Against the background of interpretation by the courts of the sweep of Section 1(b) and the criteria described, the Commission concluded "that the gas consumed by the City at its electric generating plant is not the subject of a sale for resale but rather of a separate sale for consumptive use . . . ." Hence it found itself "directly forbidden by Section 1(b) to fix the rate for such sale." It failed "to find any basis for the charge of discrimination" on which ground the City had sought elimination of the exclusionary clause complained of. It took into account the fact that the customer here is a municipality, but "having determined that this is a direct sale for consumption use, we are not permitted by the Act to alter the result because of that fact."[3]

In reviewing the order of the Commission dismissing the City's complaint against Kansas-Nebraska, and the findings and conclusions assailed by the City, we must regard Section 19(b) of the Act which provides that "The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Our role in this particular was well defined in *Cities Service Gas Co.* v. *Federal Power Com'n*, 155 F. 2d 694, 698 (10th

[3] The Commission noted: "Recommendations have been made by the Commission to the Congress that would extend our jurisdiction over interstate sales by natural-gas companies to include direct sales to industries and sales to utilities which are not for resale. But until Congress gives us that authority, we have no alternative but to follow the statute."

Cir. 1946), *cert. denied*, 329 U. S. 773 (1946): "It is of first importance to take account of the respective provinces assigned to the Commission and the courts on review in order that we may perform the functions assigned to us without trespass upon the administrative prerogatives." See also *State Corp. Com'n of Kan.* v. *Federal Power Commission*, 206 F. 2d 690, 698 (8th Cir. 1953), *cert. denied*, 346 U. S. 922 (1954).

The Commission's opinion notes "There is no serious dispute as to the relevant facts." We may comment as we proceed.

In April 1942 the City operated its own electric power plant which then and previously used coal and oil as fuel. If it then sought to transfer to the use of natural gas as fuel, a tap line from Kansas-Nebraska's interstate line to the power plant would have served the power plant fuel needs, and the State of Nebraska would have had "full power under the act and the decisions to regulate such direct sales of natural gas for consumption within its borders." *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185 F. 2d 357, 361, (3d Cir. 1950). See also *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U.S. 329, 334 (1951).

In April 1942 the local gas distribution system was privately owned and operated by one Grosser, doing business as the Hastings Gas Company. The latter as of September 27, 1941 had entered into a town-border contract with Kansas-Nebraska under the terms of which Kansas-Nebraska agreed for a term of ten years to sell and deliver to the Hastings Gas Company and the buyer agreed to purchase and receive "natural gas for the entire requirements (except as hereinafter otherwise

provided) of gas of Buyer and of the customers supplied by Buyer in the City of Hastings . . . ." The contract provided separate rates for differing classes of sales for resale and specifically set forth that: "GAS USED OR CONSUMED BY BUYER FOR INDUSTRIAL USE SHALL NOT BE COVERED BY THE FOREGOING SCHEDULE, BUT SHALL BE COVERED BY SEPARATE AGREEMENT." This town-border contract was assigned to the City when it purchased the distribution system. On April 13, 1942, Kansas-Nebraska began selling gas to the City, and such sale for resale was clearly within the Commission's jurisdiction.

Instead of running a separate tap line to its power plant to deliver the gas it was to consume, the City and Kansas-Nebraska agreed that gas, whether for resale or for use in the production of power, was to be delivered and title was to pass at the Kansas-Nebraska town-border station. But the City executed a *separate* contract for the purchase of power plant gas. The parties further agreed that City would provide a metering and regulating station site *at the power plant* where all power plant gas was separately measured, as used. Kansas-Nebraska installed and maintained the metering station although it did not construct a pipeline into the plant. Thereafter, the 1942 power plant contract was superseded by a separate plant contract dated July 1, 1945, which in turn was superseded by a separate plant contract dated June 18, 1948. Under each of these plant contracts, the City since April 1942 has been billed monthly and has paid for plant gas separately from that acquired and resold in the City's distribution system.[4]

[4] In view of litigation, the parties have stipulated that these monthly billings and payments made under the power plant contract shall be without prejudice to their respective claims with respect thereto.

In 1947 following a survey looking to a proposed revision of the rate structure of Kansas-Nebraska, the latter tendered to the Commission for filing its Rate Schedule G-1 providing a new rate schedule covering the sale of natural gas for resale to all of its town-border customers, including the City of Hastings. Rate Schedule G-1 provided that "This rate schedule shall apply separately to all natural gas delivered by the Company to the utility for a single community and its environs, for resale and shall also apply to such additional natural gas as the utility may require for the operation of its gas system in such community and its environs, but *shall not apply to gas used or consumed by Utility (or any of its Departments) for industrial purposes.*" (Emphasis supplied.) Rate Schedule G-1 further provided for the sale and delivery of gas on a contract demand basis which was to be established either by agreement of the parties or, by definition, to be the greatest quantity of natural gas delivered by Kansas-Nebraska to and accepted by the City in any one day. Kansas-Nebraska proposed no change to authorize it to sell gas for power plant use.

The City, although advised of a prospective annual reduction amounting to $25,000 in the cost of gas purchased for resale, voiced objection to Rate Schedule G-1, both because of the contract demand form of obligation and because of the exclusionary clause. The City claimed that it should be allowed to use contract demand gas in its power plant whenever the requirements of its resale customers permitted. The City expressed to the Commission its fears that Kansas-Nebraska had oversold its capacity and had "all the winter load that they can safely supply and maybe more for this entire area is

developing at a rapid rate." The City directed inquiries to the Commission concerning the effect of the exclusionary clause pointing out that "If this power plant belonged to someone other than ourselves, under the terms of the contract, we would be permitted to serve it . . . . The contract for the power plant can be terminated on July 1, 1948 if the City so chooses. We are however, afraid of the consequences and seek your advice in this connection . . . ." Various questions were put to the Commission, among them: "If the City does terminate the power plant contract and asks for a reasonable increase in the firm contract demand, could the supplier refuse, assuming the supplier was able to supply the increase?"[5] This letter was dated March 5, 1948, and was acknowledged March 26, 1948.

The Commission replied (quoting in part): "At present the rate G-1 in the FPC Gas Schedules is specifically not applicable to gas which would be used by your power plant. This, [sic] it would appear that some other rate must be agreed upon between Kansas-Nebraska Natural Gas Company and Hastings for the power plant gas." Pointing out that several of the questions involved legal and factual matters as to the effect of the Commission's jurisdiction, abandonment of service and discrimination, the Commission notified the City that it decides each case on its merits and "does not, as a general policy, render advisory opinions." The Commission's letter concluded that: " . . . signing the contract does not preclude the sebsequent filing of complaints, or the subsequent modification of any provision

[5] The initial contract demand agreed upon by the parties was 7300 MCF per day. Within three years the City had increased its contract demand from that figure to 12,254 MCF.

which could be proved to be unreasonable and over which the Commission has jurisdiction." (Emphasis supplied).

On April 12, 1948, the City executed a resale contract effective October 1, 1947 (the effective date of Rate Schedule G-1) to continue for a period of five years thereafter incorporating "Rate Schedule G-1 or any effective new or superseding rate schedule on file with the Federal Power Commission." This contract further superseded and cancelled the outstanding 1941 town-border contract.

As of the same date, April 12, 1948, the City and Kansas-Nebraska executed a new and separate contract under the terms of which Kansas-Nebraska agreed to pay the City a transportation charge for the delivery of gas to the meter at the power plant.

Thereafter in May 1948 the City wrote the Commission: "It was explained to us by Mr. S. D. Whiteman, President of our supplying Company, and we interpret the contract the same, that if the Municipal Power plant were owned by a corporation, a private owner or by any one other than ourselves, we could and would under the terms of the contract serve on an interruptible rate." The City requested a hearing and concluded: "According to our latest information, the firm demand on the Kansas-Nebraska Natural Gas Company's system is dangerously approaching the peak ability to deliver and is getting nearer to this peak constantly. This causes us to be more desirous than ever to control the supply to the power plant and receive full credit for peaks shaved and load factor produced." The Commission advised "that it has no jurisdiction to require the amendment which

you seek in Kansas-Nebraska Natural Gas Company's filed rate schedule."[6]

Next, on June 18, 1948 the City and Kansas-Nebraska executed a new and separate contract covering the sale and delivery of "natural gas for the entire fuel requirements (including generation of electricity, heating and all other uses) of Buyer for its electric light and power plant at Hastings, Nebraska." This power plant contract was to commence as of July 1, 1948 and to terminate on July 1, 1951 unless earlier terminated as provided therein. In December 1949 the City attempted to cancel the power plant gas contract but Kansas-Nebraska refused

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[6] Federal Power Commission
Washington 25

Docket No. 1N-535 June 2, 1948
City of Hastings
Hastings, Nebraska

Attention: Mr. P. K. Giffin
Manager

Gentlemen:

This is in reply to your letter of May 3, 1948, relative to the filing of a friendly complaint and to the Applicable clause of Rate Schedule G-1 filed by Kansas-Nebraska Natural Gas Company. Your question is leveled against the fact that this clause specifically excludes gas used or consumed by the purchaser for industrial purposes.

Your Complaint in essence involves the amendment of the rate schedule to make it applicable to gas sold for direct use, and in effect would entail the establishment by this Commission of a rate for gas which is not resold, but which is used directly in your power plant.

The Natural Gas Act exempts from Commission jurisdiction rates for the sale of gas which is used directly and which is not resold. The Commission concludes, therefore that it has no jurisdiction to require the amendment which you seek in Kansas-Nebraska Natural Gas Company's filed rate schedule. In the absence of such rate jurisdiction, the Commission cannot undertake formal proceedings in this matter.

By direction of the Commission.

Very truly yours,
Leon M. Fuquay
Secretary.

to accede and instituted an action seeking a declaratory judgment that the power plant contract was valid. The City thereupon gave effectual notice of termination as of July 1, 1950, following which Kansas-Nebraska invited the City to negotiate a new agreement to cover the sale of power plant gas on and after July 1, 1950. The City was notified that should it thereafter continue "to divert and use in the Water and Light Plant any gas delivered by us pursuant to the contract between us and the City of Hastings . . . we shall hold the City accountable to pay for such gas so diverted and used . . . at the same rates and pursuant to the same terms as are contained in the contract dated June 18, 1948, and in accordance with the monthly billings commencing March 1, 1949 . . . ."[7] September 20, 1950, the City filed its complaint with the Commission.

The entire course of dealings clearly permitted the Commission to find the existence of separate rates, separate billings, separate negotiations, separate contracts, separate allocation of gas and effective separate measurement facilities.[8] The parties even contracted to modify their agreement as to the point of delivery of the power plant gas, with the City taking delivery at its own

[7] When the City as alleged, ignored this invitation to negotiate a new power plant contract and continued to divert gas sold under the resale contract for use at the power plant, Kansas-Nebraska filed a second action seeking to enjoin the City against the practice complained of. District Judge Delehant found for Kansas-Nebraska on March 8, 1954.

[8] To illustrate, the parties stipulated:

"Effective December 1, 1949, the contract demand under the Town Border Contract was 12 million cubic feet per day; that on December 31, 1951, the Company delivered to the City and the City received at its town-border stations 12,254,000 cubic feet of gas, and on said date the City's power plant used 2,088,000 cubic feet of said gas; that on January 22, 1952, the Company delivered to the City and the City received at its town-border

meter at the power plant, and with Kansas-Nebraska paying a transportation charge for use of the City's pipeline from the town-border station to the power plant meter. Moreover, the resale rate schedule and the town-border contract specifically excluded gas used by the City for industrial purposes, thus reflecting the language of the statute itself which conferred Commission jurisdiction over sales for resale, but not over "any other sale." The City expressly recognized that fact, as has been shown.

But the City urges, all this was changed when, as of July 1, 1950, the City unilaterally terminated the June 18, 1948 power plant gas contract. Thereupon the City was to be permitted to divert gas purchased for one purpose to another and totally different purpose. If a rate schedule filed pursuant to law contained an exclusionary clause which would stand in the way the Commission must strike it down. The City claimed to be able, under that very rate schedule, to nominate its own contract volume, obligate Kansas-Nebraska (within permitted limits of variance) to deliver that amount, to pay not less than 80% of the demand rate for resale gas, actually resell only a portion of it,[9] and then divert the balance to

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stations 12,504,000 cubic feet of gas of which the City's power plant used 1,002,000 cubic feet."

Thus, the situation here presented is entirely different from that before the Supreme Court in United States v. Public Utilities Commission, 345 U.S. 295, 318 (1953), where the Court said:

". . . But there is **no record** evidence of separate rates, separate negotiations, separate contracts or separate rate regulation by official bodies, in short that the 'sales' themselves were separate, and it is in these terms that the Act would require us to fix the limits of the jurisdictional grant." (Emphasis supplied.)

[9] We have not been shown the actual volume of gas consumed each year in the Hastings Power Plant but for the year 1951 the volume was 610,102 MCF. Apparently the 1942-1947 annual average consumption was about 437,000 MCF.

its power plant to be used in generating electricity. This amount of gas so diverted, having already been paid for pursuant to contract, would be free and without further cost to the City, so far as power plant use is concerned.[10] An exclusionary clause which would operate to *prevent* any such result is unreasonable and discriminatory, the City argues.

The City relies principally upon *State Corp. Com'n of Kan.* v. *Federal Power Commission*, 206 F. 2d 690 (8th Cir. 1953), *cert. denied*, 346 U.S. 922 (1954); *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185 F. 2d 357 (3d Cir. 1950); and *California Electric Power Co.* v. *Federal Power Commission*, 199 F. 2d 206 (9th Cir. 1952), *cert. denied*, 345 U.S. 934 (1953). In the first of these, Northern Natural Gas Company claimed that the Commission erred in suspending under Section 4(e) of the Act Northern's Schedule Ind-1, relating to sales for resale for large-volume industrial use only, and further that its Schedule Ind-2 was not subject to Commission jurisdiction, and hence not subject to suspension. The Commission found that at no time was contract demand gas delivered by Northern for or with the understanding that it was for industrial use only or for the purchaser's own use, and that if any part of the gas was sold by a purchaser to large industrial user (so as to bring that sale within Ind-1) or was used by the purchaser (so as to bring it within Ind-2) the volumes so used were included as part of the volumes delivered in satisfaction of Northern's contract demand obligation under its CD-1 Schedule. (In the *Hastings* case the contract demand schedule was not only complete but applied only to gas

[10]The City contends that since December 1, 1949, the only payment for gas due to Kansas-Nebraska is that required under the town-border contract.

for resale, and the City insisted that power plant gas was excluded from its estimates of the contract demand volume as nominated by it.) The Commission further found that Schedules Ind-1 and Ind-2 contained only a commodity charge, and therefore it was impossible to compute the charge for services under Schedule CD-1 unless reference be made to Northern's CD-1 Schedule for the demand charge. Thus the CD-1 Schedule was an inseparable part of both Ind-1 and Ind-2 which, by themselves, were incomplete rate schedules. In view of the inseparability of the schedules mentioned, the Court sustained the Commission remarking (206 F. 2d at 701): "Both the demand charges which Northern makes in its sales of natural gas for resale to its utility customers and its commodity charges that are added to make up the full price charge for such gas are within the jurisdiction of the Commission." In this connection it considered the Commission opinion in the instant case and noted the differences between the situation presented by the Northern Natural Gas Company plan and that existing here and observed (206 F. 2d at 701): "In the absence of proof such as existed in the City of Hastings case of direct sales for industrial use or for the purchasing utility's own use, the statute conferring the jurisdiction to regulate on the Federal Power Commission is controlling." Pointing to the criteria to be found in *United States* v. *Public Utilities Commission*, 345 U. S. 295 (1953), the Court found no error in the Commission's exercise of jurisdiction since the record before it, quite the contrary of the *Hastings* case, precluded a finding that there was "an essentially separate transaction covering the power directly consumed by the purchaser" which could be identifiable. (206 F. 2d at 702). This conclusion and its affirmance of the Commission find-

ings, coupled with the Court's acceptance of the rationale of the Commission's opinion in the *Hastings* case, establish no variance from our own view.

In *California Electric Power Co.* v. *Federal Power Commission, supra,* the petitioner sought review of a Commission order directing it to cease and desist from charging the Department of the Navy and Mineral County, Nevada, any rate other than "filed rates" for electric energy sold to those customers. There was no evidence that sales for resale resulted in providing fuel to a competing utility. The Court noted that the "supposed non-jurisdictional part of the energy is indistinguishable at the point of sale from the remainder" and that the Commission had contended "that it is not practicable to separate the jurisdictional from the alleged non-jurisdictonal part." (199 F. 2d at 209). In the instant case there is no such problem, and the exact amount of gas consumed by the power plant is, and throughout the entire history of the dealings between the parties, has been measurable. It is clear that the Court was dealing with no such situation as is presented in the instant case. The City quotes from page 210 of the opinion:

> "In virtually all sales of power to a public body, such as municipality, we would suppose that some part of the energy is used by the purchaser for its own purposes, the rest being resold to the consuming public. It would create untold difficulty and confusion if petitioner's argument in respect of severability for rate regulation purposes were to be given countenance."

When the Court talked about the energy "used by the purchaser for its own purposes," it is not to be assumed that the consumptive use included providing fuel for a

generating plant. Rather, it should be noted in the instant case, the resale rate under Rate Schedule G-1 does in fact apply in the City's behalf as to lost and unaccounted for gas, and as to the use of gas by the City to heat its various facilities, as well as gas used in city offices, school buildings, library, city hall and other incidental city uses. This is the gas for the purchaser's "own purposes" which comes within the contract demand covered by the resale rate and is distinctly separable from the gas consumed at the power plant which is metered as used.

In *Colorado Interstate Gas Co.* v. *Federal Power Commission, supra,* the petitioner sold gas to Public Service Company, a local utility, and to the City of Colorado Springs, both of which resold gas to local consumers and likewise consumed some gas in their own boiler plants for the generation of electricity and in the case of Public Service, for production of steam for resale. While the opinion noted that the parties would like to have the court decide whether gas consumed in the boiler plants was subject to regulation by the Commission, it pointed out "that the question is not presented by the record now before us and that we are not called upon to decide it." (185 F. 2d at 359). At page 360, however, the opinion construed and applied *Panhandle Pipe Line Co.* v. *Public Service Commission*, 332 U. S. 507 (1947), commenting: "Nothing need be added to this clear statement of the act. When applied to the problem before us it means that the power of the Commission to regulate the sale of natural gas by Colorado Interstate extends only to sales to buyers for resale and not to sale to buyers for their own consumption." At page 361 we read:

> "Public Service Company of Colorado, the City and County of Denver and the City of Colorado

Springs have intervened and urge, inter alia, that the jurisdiction of the Federal Power Commission should be sustained in order that the sales of gas to Public Service and Colorado Springs for consumption in their own boilers may be subject to its regulation. As we have already pointed out, it is beyond the power of the Commission to regulate the sales of this gas if in fact they must be regarded as sales for consumption and not for resale. If, however, this should be found in a proper proceeding to be the case the intervenors are not without protection. In that situation the State of Colorado has full power under the act and the decisions to regulate such direct sales of natural gas for consumption within its borders."

We perceive no holding in the cases mentioned in derogation of the Commission's conclusion here. The City's complaint made no attack upon Rate Schedule G-1 as a whole, although as stated by the Third Circuit in the *Colorado* case, last noted, upon a proper showing various remedies are available. Rather, in the instant case the City specifically prayed "That the Commission find that the rate prescribed by Rate Schedule G-1 is the proper rate to be charged by Kansas-Nebraska for all of said gas."

The record discloses no proffer of evidence to demonstrate, and no proof of, discrimination. As to other municipalities shown on the map of the Kansas-Nebraska system filed with its Schedule G-1, towns served at retail and towns served at wholesale may be noted. Certain privately owned gas distributing companies bought gas and resold it to municipal power plants but these involved sales for resale. Hastings informed the Commission that it was the only resale customer which owned a power plant using gas purchased from Kansas-Nebraska. The Commission noted that the latter re-

fused to sell gas to another customer for a like purpose and concluded that there is no "basis for a finding of discrimination."

In effect then, the Commission says it has canvassed the entire subject matter as submitted to it, having taken jurisdiction for that purpose, and concludes that it lacks authority on the showing made to require the amendment which the City seeks in Kansas-Nebraska's filed rate schedule. In effect, the Commission says when the City cancelled its contract for power plant gas, it put itself into the position of having no contract for, and no right to, power plant gas, and the Commission is unable to write a new contract for the parties. The Commission says it may not, because it cannot, although it has recommended to Congress that it be given authority to, regulate sales not now governed by the statute. It therefore concludes that the complaint must be dismissed.

We cannot say that the Commission's findings and conclusions lack a reasonable basis in law[11] and the support of substantial evidence of record. On the contrary, we deem the findings of the Commission to be supported by substantial evidence and therefore to be conclusive. In this view the Commission's order will be affirmed.

FAHY, *Circuit Judge*, dissenting: The question is one of the Commission's jurisdiction, not of how the case should be disposed of on the merits. I agree with Commissioner Buchanan, then Chairman, in his dissent from the Commission's denial of jurisdiction.

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[11] Cf. Public Law 323, 83rd Cong., 2d Sess., March 27, 1954; nor is there anything contra in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954).

The only contractual arrangement under which Kansas-Nebraska has supplied natural gas to the City since July 1, 1950, is the Contract Demand type, initiated at rates set forth in Rate Schedule G-1. This arrangement was instituted at the insistence of Kansas-Nebraska and superseded a block or commodity type rate. Kansas-Nebraska delivers all gas to the City at its town border stations and it is then distributed by the City through its own distribution system. Kansas-Nebraska is required daily to supply all or any portion needed of a quantity of gas "nominated" by the City on the basis of peak-day requirements of the City's firm resale customers, but no more.[1] The City is required to pay an amount equal to the sum of (1) a demand charge computed on the quantity of daily demand. which in no case may be less than 80% of the Contract Demand, and (2) a specified commodity charge for gas actually delivered. This contract and rate schedule were entered into April 12, 1948, effective retroactively to October 1, 1947. Prior thereto the City paid for gas sold to it for resale on the basis only of the quantity delivered. The change, insisted upon by Kansas-Nebraska, led to the controversy which has now reached this court.

Until July 1, 1950. a separate contract covered the gas used by the City for fuel at an electric generating plant which it owns and operates. This separate contract was validly terminated effective that date, as a result of the controversy referred to regarding the change to the Contract Demand arrangement, effective October 1, 1947. Since July 1, 1950, all gas supplied by Kansas-Nebraska to the City has been within the amount the City was

[1] Included in the quantity nominated is also gas to be consumed by the City for municipal purposes other than as fuel for the electric generating plant.

required to nominate as possibly needed for its firm resale customers. But all of it has not in fact been resold by the City to such customers. When not needed by them some has been used by the City as fuel for its electric generating plant.

Schedule G-1 contains a provision which reads,

> "This rate schedule * * * shall not apply to gas used or consumed by Utility [the City] (or any of its Departments) for industrial purposes."

A provision of similar character had originated some years earlier. It seems first to have appeared in a contract which was assigned to the City in 1942 by the Hastings Gas Company which owned and operated the distribution system before it was acquired at about that time by the City. The City, however, already owned and operated the electric generating plant, which was fueled with coal and oil before the City acquired the distribution system from the Hastings Gas Company.

The complaint of the City filed with the Commission in September 1950 requests the Commission, *inter alia*, to remove from Rate Schedule G-1 the provision that its rates shall not apply to gas used by the City for industrial purposes, that is, as fuel for its electric generating plant, and also to find that the gas used since termination of the separate contract has been sold to the City by Kansas-Nebraska for resale and should be paid for at the rate prescribed in Rate Schedule G-1. It is this complaint which the Commission dismissed for lack of jurisdiction. *Hastings* v. *Kansas-Nebraska Nat. Gas Co.*, —— F. P. C. ——, 98 P. U. R. (N. S.) 1.

Howsoever the Commission might decide the merits of the questions raised by the complaint and whatsoever

relief it might or might not give the City, it seems to me the Commission has jurisdiction to take up the questions and decide them; for the gas used by the City as fuel in the generating plant, at least since July 1, 1950, I think has not been directly sold to the City for that use but is part of a larger quantity nominated by the City for resale. Though not always needed for resale, because at particular times the City's firm customers do not require all of it for their own purposes, its resale character is acquired when it is delivered to the City at the town border stations under the Contract Demand agreement. All is available to the City for resale and must be paid for, at least in part, on the basis set forth in Rate Schedule G-1. There is thus not merely a commingling of the gas itself but also a commingling of the price as it were. The rate was formulated on the theory that Kansas-Nebraska must have available for resale by the City a larger quantity than might actually be resold. It is paid accordingly. It seems to me, therefore, that the terms governing this gas are within the jurisdiction of the Commission over the "sale in interstate commerce of natural gas for resale", Section 1(b) of the Natural Gas Act, 52 Stat. 821 *et seq.*, as amended, 15 U. S. C. §§717 *et seq.* (1952), and that use of some of it on an interruptible basis, that is, when not needed by the City's firm customers, for fueling the generating plant, does not retroactively oust the jurisdiction which attaches to the larger volume of which that so used is a part. *California Electric Power Co.* v. *Federal Power Commission*, 199 F. 2d 206 (9th Cir.), *cert. denied*, 345 U. S. 934; *United States* v. *Public Utilities Commission*, 345 U. S. 295, 317-8. See, also, decision of the Commission *In the Matter of Colorado Interstate Gas Co.*, 8 F.

P. C. 313, 82 P. U. R. (N. S.) 350.[2] Such use might be a factor to be considered by the Commission on the merits, for example, as to the valdity or reasonableness of the so-called exclusonary clause or of the rates for different uses, but this should not be confused with the jurisdictional question itself.

Doubt as to this view is rested in part upon the statement of the Supreme Court in *United States* v. *Public Utilities Commission*, *supra* at 317-8, regarding the materiality on the jurisdictional question of evidence of separate rates, negotiations, contracts, or rate regulations in the history of a particular case. It is true that in the present case, prior to July 1, 1950, there was the history, above referred to, of a separate contract covering gas used by the City as fuel in its generating plant, under which contract, considered alone, no doubt there was a direct sale of gas to the City not for resale, and one therefore beyond the Commission's jurisdiction. But at least since July 1, 1950, there has been no identifiable "separate transaction covering the power directly consumed by the purchaser", notwithstanding as an engineering proposition "accurate measurement of the volume resold and the volume directly consumed * * * is possible for each billing period." (345 U. S. at 318). Moreover, this separate contract had been the subject of controversy, along with the Contract Demand arrangement and its controverted provision, since this new arangement was pressed upon the City and reluctantly accepted upon receipt of advice from the Commission that acceptance would not preclude "modification of any

[2] The order of the Commission in this proceeding was set aside in part in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185, F. (2d) 357 (3d Cir.), but the court did not pass upon the question now before this court.

provision which could be proved to be unreasonable and over which the Commission has jurisdiction."

I do not think anything said in *United States* v. *Public Utilities Commission* is intended to cause a history such as this to bar Commission jurisdiction of the merits of this case, especially when a change in the relations between the parties, brought about by Kansas-Nebraska, has broken the very history upon which it relies and has led to current conditions which in and of themselves are within the Commission's jurisdiction. Where the gas involved in the jurisdictional issue is within the volume purchased by the City at wholesale in interstate commerce, at a rate related to that volume, with a right to resell any or all of it, that is, when the portion used in the generating plant and not resold does not bring the total quantity received by the City above that which is thus available for resale, I think the Commission has jurisdiction of the terms and rates which should apply.[3] A provision in the rate schedule that the rates therein set forth shall not apply to gas used by the City for industrial purposes does not preclude the Commission from taking jurisdiction to consider what rate should apply, when the gas used for industrial purposes is within that for which the City is required to pay on a resale basis.

[3] The Commission terminated the proceedings before it by an order dismissing the complaint "for want of jurisdiction" and the decision is treated by all as a jurisdictional one. Nevertheless, a sort of partial jurisdiction seems to have been exercised by the Commission in ruling the exclusionary clause to be non-discriminatory under the Act.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

OPINION No. 244

In the Matter of City of Hastings, Nebraska, v. Kansas-Nebraska Natural Gas Company, Inc.—
Docket No. G-1487

APPEARANCES

For City of Hastings, Nebraska
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UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Thomas C. Buchanan, Chairman; Dale E. Doty, Claude L. Draper, Nelson Lee Smith and Harrington Wimberly.

January 30, 1953

In the Matter of City of Hastings, Nebraska, v. Kansas-Nebraska Natural Gas Company, Inc.—
Docket No. G-1487

The question presented by this proceeding is whether, on the facts set forth below, a sale of natural gas by a

natural gas company to a distributing utility—in this instance a municipality—which consumes such gas in its own electric power plant constitutes a "sale for resale" subject to our jurisdiction under the Natural Gas Act, when such gas is delivered by common facilities together with other gas which is sold to the muncipality and in fact resold by it to others. Because of the decisive importance of the physical facts and the historical arrangements among the parties we shall discuss them in some detail.

On September 20, 1950, the purchaser, the City of Hastings, Nebraska (the City), filed with the Commission a complaint against the seller, Kansas-Nebraska Natural Gas Company, Inc. (Kansas-Nebraska), a natural-gas company within the meaning of the Natural Gas Act, directed principally at the following restriction contained in the applicability clause of Kansas-Nebraska's Rate Schedule G-1, constituting a part of its tariff filed with this Commission:

> This rate schedule shall apply separately to all natural gas delivered by the Company to the utility for a single community and its environs for resale and also shall apply to such additional natural gas as the utility may require for the operation of its gas system in such community and its environs, *but shall not apply to gas used or consumed by utility (or any of its departments) for industrial purposes* (Emphasis applied).

The City contends that the exclusionary provision is unduly discriminatory, invalid, and void, and should therefore be eliminated.

On October 30, 1950, Kansas-Nebraska filed a motion to dismiss the complaint on the ground that the Com-

mission lacked jurisdiction. Thereafter, on November 10, 1950, the City filed an affidavit in opposition to the motion. Pursuant to our order issued December 28, 1951, we heard oral argument on February 28, 1952, on the matters thus presented.[1]

Finding that the pleadings did not afford an adequate basis to determine the issues presented, we deferred decision on the motions and issued our order of March 13, 1952, directing that a prehearing conference and hearing be held. Before a duly designated Presiding Examiner, such prehearing conference was conducted on May 26, 1952, resulting in a stipulation as to certain of the facts. Hearings were held on May 28, and 29, 1952. On motion of the City, we omitted the intermediate decision procedure. Briefs were thereafter filed by the various parties.

There is no serious dispute as to the relevant facts.

In April 1942, the City acquired from the Hastings Gas Company the local distribution system located in the City. The Hastings Gas Company had previously purchased gas from Kansas-Nebraska under a town-border contract which, among other things provided that:

> Gas used or consumed by Buyer for industrial use shall not be covered by the foregoing schedule, but shall be covered by separate agreement.

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[1] On February 18, 1952, Kansas-Nebraska submitted for filing certain exhibits as part of its motion to dismiss. These the City moved to strike on February 25, 1952 and requested the commission to overrule Kansas-Nebraska's motion to dismiss and to set the matter for hearing. It may also be noted that we granted leave to file briefs as *amici curiae* to Minneapolis Gas Company and to the Metropolitan Utilities District of Omaha, Nebraska, both of which were submitted on February 27, 1952.

This contract was assigned to the City when it purchased the distribution system, and on April 13, 1942, Kansas-Nebraska began selling gas thereunder to the City.

When the City purchased the distribution system, it already owned its own electric power plant which was then operated with coal and oil. On April 11, 1942, Kansas-Nebraska and the City executed a separate contract for the sale of gas on an interruptible basis for the power plant. This contract provided that such gas be delivered to the City at Kansas-Nebraska's town-border station, and that title to and responsibility for such gas pass to the City at the point of delivery. But also provided, however, that such gas be measured at the power plant and that the City there provide a site for a metering and regulating station to be installed and maintained by Kansas-Nebraska.

Kansas-Nebraska has no lines within the limits of the City.

The foregoing contract for power plant gas was later superseded by a separate contract covering power-plant gas, dated July 1, 1945. This latter contract was similarly superseded by a separate contract, dated June 18, 1948. Under these contracts, it appears that, until December 1, 1949, the City was billed and paid for power-plant gas separately from gas billed and paid for under the aforementioned town-border resale contract.

This town-border resale contract, as assigned to the City, was by its terms to continue in effect until September 26, 1951. However, on October 1, 1947, Kansas-Nebraska filed with the Commission a new Rate Schedule G-1 which became effective October 1, 1947 and

which, in exclusionary language similar to that in the replaced schedule, provided:

> This rate schedule shall not apply to gas used or consumed by the utility (or any of its departments) for industrial purposes.

The City objected to this provision and a similar exclusionary provision in a proposed form of contract, but it nevertheless signed such a contract on April 12, 1948, effective as of October 1, 1947. Also, on April 12, 1948, the City and Kansas-Nebraska signed a contract whereby the *latter agreed to pay the City 3/4c per Mcf in compensation* for the City's transportation of the power plant gas from the town-border station to the power plant.

Operations, billing, and payment for power-plant gas continued as above until December 1, 1949, when the City claims that the power-plant gas contract was terminated in accordance with a provision therein vesting specified rights for termination in the signatories. Kansas-Nebraska denies that the contract was terminated on that date, claiming a termination date of July 1, 1950. Which claim is right is not a material factor here, as we shall later see.

Since December 1, 1949, the City has continued taking gas from Kansas-Nebraska for use at its power plant, contending it has a right to do so under the town-border resale contract and Rate Schedule G-1. Kansas-Nebraska denies that the City has such a right. These views are the subject of judicial proceedings between the parties, yet unsettled. Provision has been made for making of payments for power-plant gas pursuant to stipulation between the parties, whereby such

payments do not prejudice the legal position of either so far as the controversy here is concerned.

Certain other facts respecting the physical operations should also be noted. Kansas-Nebraska now delivers gas to the City's general distribution system. Gas is measured at these stations, and, as already noted, at the power plant. There is no line from any town-border station which transmits gas solely to the power plant. From three of those stations, it would be physically possible to deliver gas to any point within the City, but it appears probable that most of the gas used at the power plant is received at the north town-border station which is about one mile north of the power plant. Such gas is commingled with other gas which the City distributes through its distribution system. The amount of gas consumed at the power plant, if any, depends upon weather and the necessities of the City's firm customers.

Prior to 1947, the City purchased gas for resale from Kansas-Nebraska under a block type rate. This was changed in 1947 to a contract demand form of rate. Kansas-Nebraska's tariff provides that the contract demand may be changed either by formal, written amendment or by a purchaser's actual taking of gas in excess of contract demand. There is testimony by the Manager and Superintendent of the City's Gas Department that the contract demand as fixed by the City has always been based solely on the requirements of the City's firm customers and without consideration of power-plant use.

The City insists that the situation of which it complains must be restrictively viewed as it existed when

the complaint was filed on September 20, 1950, when there was in effect between the parties only one agreement, the town-border resale contract. We do not agree, for the reasons set forth below.

Our jurisdiction under Section 1(b) of the Natural Gas Act extends to the "sale in interstate commerce of natural gas for resale" but not to any "other" sale. That the sale of power-plant gas under the initial 1942 contract was not a sale for resale is not open to serious question. There was no rate interdependence whatsoever between the power-plant contract and the town-border contract. Thus, there could be no question of any sort if the City had received the power-plant gas through a separate tap on Kansas-Nebraska's line and carried such gas directly to the power plant by means of a line used solely for that purpose.

Nor do we perceive on this record how the power-plant contract can be said to envision a sale for resale merely because the parties agreed to move through common facilities the power-plant gas together with gas delivered under the resale contract, with the volume of power-plant gas to be measured later at the power plant. Nor does it appear that the parties intended that the power-plant sale become in fact—or even be considered as—a part of the sale under the town-border contract when they agreed to leave within the City's control, as purchaser, the right to determine how much of the total gas delivered was to be actually resold by the City and how much was to be used in its power plant.

Turning next to 1947 when the block type rate in the resale contract was changed to a contract demand type rate, we conclude that *separate legal character of the power-plant contract* remained unchanged. For the

significant operational facts were not altered and there was injected no rate interdependence between the town-border contract and the power-plant contract. This conclusion is reinforced by the fact that, at the same time the parties executed a new town-border resale contract which, like its predecessor, contained a provision excluding gas used by the City for industrial purposes, they also executed a contract whereby Kansas-Nebraska would pay the City 3/4c per Mcf for its transportation of the power-plant gas to the power plant.

Throughout the foregoing period, both the resale rate schedule and the town-border resale contract specifically excluded gas used by the City for "industrial purposes," which we hold forbade, on the facts of this case, their application to gas used by the City in its power plant.

It is against the foregoing background that the rights of the parties must be assessed when the power-plant contract terminated, whatever the date. Prior to that time, our analysis above shows that the parties had effectively established separate rates for separate sales under two separate contracts—the town-border resale contract subject to our rate regulatory powers, and the direct sale power-plant contract exempted by statute from our rate authority. The termination of the separate power-plant contract and sale does not invest us with power—and we cannot find that the city has unilateral authority—to change the terms of the resale contract and companion rate schedule so as to make them apply to gas used by the City in its power plant.[2]

The complaint of the City in part recognizes that on the facts here it may not properly purchase power-plant

[2] The legal consequences of such use after termination of the power-plant contract are accordingly not matters for our decision.

gas under the town-border resale rate schedule when it seeks elimination from the latter of the exclusionary clause. This recognition is qualified, however, by the charge of discrimination.

But our conclusions above are not altered when we examine the charge that the exclusionary provisions of the resale contract and rate schedule are unduly discriminatory as to the City. It asserts that, among those purchasing under that rate schedule at the time the complaint was filed, the City was the only resale customer which owned a power plant using gas purchased from Kansas-Nebraska. It appears that Kansas-Nebraska subsequently refused to sell gas to another customer under the resale rate schedule for use in the latter's power plant. We fail to find any basis for the charge of discrimination.

It may also be noted that we have reexamined our own and judicial decisions on which the City relies, and we have considered the recent decision of the United States Court of Appeals for the Ninth Circuit in *California Electric Power Company* v. *Federal Power Commission*, No. 12,987, decided October 14, 1952, affirming, among other things, our rate regulatory authority under the Federal Power Act over an interstate sale of energy under a single contract to the Department of the Navy which consumed most of such energy and resold some. None of these cases affords support for the City's position here.[3] The distinguishing circumstance here is

[3] For example, in *Colorado Interstate Gas Company* v. *Federal Power Commission*, 185 F. (2d) 357, (C. A. 3, 1950), the Court expressly refrained from deciding whether the sales there involved were within the jurisdiction of the Commission. But the opinion of the Court indicates to us that Congress did not confer upon the Commission the authority we are asked to assert here.

that the parties in fact and in law consummated a separate and long-continued direct sale beyond our jurisdiction.

The City's belated dissatisfaction with that arrangement can not, of course, empower us to fix the rate for gas separately sold by Kansas-Nebraska to the City for its own use, contrary to the unambiguous prohibition in Section 1(b) against our regulation of any interstate sales other than sales for resale. On the undisputed facts, both the City and Kansas-Nebraska fully recognized and separately provided for the daily delivery to and use by the City of large quantities of gas under the boilers of the City's electric generating plant, apart from delivery of other gas to the City for resale for ultimate public consumption. So also did they agree upon and provide for a method of measurement of the quantities so consumed and not resold. We cannot find on the facts here that such method precludes or interferes with the exercise of our rate authority over the quantities which are sold under the town-border contract for resale.

Having found that the gas consumed by the City at its electric generating plant is not the subject of a sale for resale but rather of a separate sale for consumptive use, we are directly forbidden by Section 1(b) to fix the rate for such sale. Since that is so, we deem it equally clear that we may not arrogate such authority indirectly by "interpreting" the resale rate schedule to apply to gas consumed by the City in the generation of electric energy, directly contrary to the long-continued express prohibition in that schedule against its application to gas so consumed by the City.

Parenthetically, we may say that, in concluding that *the gas consumed by the City is not the subject of a*

sale for resale, we have taken into account that the fact the customer here is a municipality. Having determined that this is a direct sale for consumption use, we are not permitted by the Act to alter the result because of that fact. Recommendations have been made by the Commission to the Congress that would extend our jurisdiction over interstate sales by natural-gas companies to include direct sales to industries and sales to utilities which are not for resale. But until Congress gives us that authority, we have no alternative but to follow the statute.

Wherefore, the Commission further *finds*:

The Complaint filed by the City of Hastings, Nebraska, against Kansas-Nebraska Natural Gas Company, Inc., on September 20, 1950, should be dismissed for want of jurisdiction, and the proceedings at Docket No. G-1487 should be terminated.

The Commission *orders*:

The aforesaid complaint be and the same hereby is dismissed for want of jurisdiction, and the aforesaid proceedings be and the same hereby are terminated.

By the Commission. Chairman Buchanan dissenting.

Leon M. Fuquay,
Secretary.

Date of Issuance: February 5, 1953.

In the Matter of City of Hastings, Nebraska, v. Kansas-Nebraska Natural Gas Company, Inc.—
Docket No. G-1487

BUCHANAN, Chairman, *dissenting*:

The decision of the majority rests solely upon the proposition that, because the City and the company had once contracted[1] for a separate sale of gas for the power plant, this Commission's jurisdiction does not reach the entire commingled flow of gas to the City. I cannot agree that our jurisdiction may be circumscribed by private contract. This is so fundamental to public utility law that no citations are needed.

We have heretofore held that electric energy or natural gas sold in interstate commerce for resale is subject to our rate jurisdiction even though a part of the commingled flow may be consumed by the buyer.[2] This view of the law was recently upheld by the United States Court of Appeals for the Ninth Circuit in *California Electric Power Company* v. *Federal Power Commission*, 199 F. 2d 206.

There is no question but that the facts concerning the physical circumstances of the sale of gas at town border metering stations by Kansas-Nebraska to the City of Hastings are indistinguishable from the facts in the Colorado Interstate Gas Company case. In that case

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[1] It is admitted by Kansas-Nebraska that the contract for power plant gas was terminated July 1, 1950 prior to the filing by the City of its complaint on Sept. 20, 1950.

[2] *In the Matter of Colorado Interstate Gas Co.*, Opinion No. 182, November 2, 1949.

In the Matter of California Electric Power Co., Opinion No. 212, April 12, 1951.

the natural gas was delivered by the selling pipe-line company to the purchasing distributing utility in a commingled mass at several town border metering stations where title and control passed from the seller to the buyer. The gas moved through the Public Service Company's distribution system to its customers and also to its electric generating plant or plants where it was burned under boilers. The volume of gas consumed was measured by Public Service at such plant or plants for its own convenience through meters owned by it. Similarly, in the case of *California Electric Power Company,* electric energy was sold by that company to the United States Navy which transmitted such energy over its lines to its depot at Hawthorne, Nevada, where part of such energy was resold to customers occupying a housing project and to various concessionaires at or near the depot and the balance of the energy was consumed in the operation of the various facilities at the depot.

The alternatives can be stated very simply, in those cases as with this either the Commission has jurisdiction over the rate charged for the entire bulk delivery at town border stations or it does not. In the above cases the Courts have agreed that we do have jurisdiction. However, under the theory adopted by the majority here, rate jurisdiction, or the lack thereof, over commingled deliveries of gas or electricity at town border metering stations apparently depends upon whether the parties agree that the entire city gate sale is subject to the Commission's rate authority or agree to carve out—*on paper*—a part of the flow and designate it a non-jurisdictional sale. This can only lead to the conclusion, as the majority has here decided, that when the parties cannot agree, exising contracts or rate schedules or

historical practice govern as to the future and the Commission is powerless to exercise its jurisdiction over the entire commingled flow of gas or electricity unless the existing contracts or rate schedules so provide. That is not my understanding of regulatory law,[3] nor does such theory serve the public interest.

In the *Colorado Interstate* case that company endeavored to change the applicability clause of its G-1 rate schedule so as to prohibit its applicability to the gas consumed in the generating plants of Public Service Company of Colorado and the City of Colorado Springs. Such action on Colorado's part followed notification by Public Service that it intended to purchase all gas under the G-1 rate schedule and to discontinue the purchase of gas for use in its power plants under separate contracts on file as rate schedules. We concluded that the change originally proposed by Colorado[4] should be disallowed and prescribed the language of the applicability clause Colorado should file.

While the United States Circuit Court of Appeals for the Third Circuit, upon review of our Order, held that we may not prohibit the inclusion in an applicability clause of language limiting the applicability of the tariff to sales within the Commission's regulatory jurisdiction, i.e., sales for resale, it refused to pass upon the question of whether Colorado's sales of gas for consumption in

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[3] *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372; *Producers Transportation Company* v. *Railroad Commission of State of California, et al.*, 251 U. S. 228; *Sproles* v. *Binford*, 288 U. S. 347, 390; *Mississippi River Fuel Corporation* v. *F. P. C.*, 121 F. (2d) 159, 13 (1941) (2 F. P. C. 170).

[4] During the hearing, Colorado filed a further revision in the applicability clause eliminating the express provisions against purchases for buyers own use and consumption.

the boiler plants of Public Service and the City of Colorado Springs are in fact sales for resale.

Colorado's amended rate filing subsequently became effective and since that time as the Commission so directed in its Opinion and Order *supra*, Colorado has sold all gas to Public Service under its G-1 rate schedule although some considerable portion thereof is consumed in the electric generating plants of that company.[5]

In the light of the Colorado case, I am unable to understand how we can do less in the instant case than we did there. Certainly the facts of the instant case present nothing that would lead to a change in judgment. In other words, we should prescribe an applicability clause for the rate schedule of Kansas-Nebraska which will not prevent the application of the rate schedule to any portion of the bulk delivery of gas by Kansas-Nebraska to the City of Hastings.

The City alleges discrimination. However, the majority finds no basis for discrimination (1) because the City is the only resale customer of Kansas-Nebraska owning a power plant using gas purchased from such company and (2) because Kansas-Nebraska turned down another customer's proposal for purchasing gas for use in its power plant under the rate schedule in question. If the test of discrimination under the majority view is so limited, then I believe the majority have erroneously restricted the scope of the Act dealing with discrimination. Section 4(b) provides:

> "No natural gas company shall, with respect to any transportation or sale of natural gas subject to

[5] Form 2 Colorado Interstate Gas Company, 1951, Pages 77, 79; Form 1 Public Service Company of Colorado, 1951, Page 92.

the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue preference or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect either as between localities or as between classes of service."

It is my opinion that Kansas-Nebraska has violated both 4(b) (1) and 4(b) (2). The majority refer to the fact that the City, during the period prior to the filing of its complaint, had entered into contracts with Kansas-Nebraska for power plant gas. As I read the evidence, the City's so-called "belated dissatisfaction" with the contract arrangement was brought about through a basic change in the rate structure of Kansas-Nebraska. It was this change which created the discrimination complained of.

The record shows that at the time the City originally contracted with Kansas-Nebraska for power plant gas it purchased gas under the town border contract on a "block type" rate which did not provide for a contract demand or demand charge. When the tariff of Kansas-Nebraska was changed in 1947, from the "block" or "commodity type" rate to a two part, demand-commodity rate, the responsibility for which the Commission cannot avoid entirely, the City vigorously protested to us concerning the proposed change in the type of rate but its protest at that time was of the informal variety and the reply rejecting the protest was in kind. The City thereafter reluctantly signed the contract of June 18, 1948. Under the demand-commodity rate the City is obligated to nominate in advance its contract demand each year. The record shows that it has nominated demands *based entirely upon the requirements of its re-*

tail customers and for municipal uses[6] *without regard to the volumes of gas required for power plant operation.* Quite evidently and without contradiction the nomination of the demand is on a sale for resale basis only, a completely jurisdictional sale.

It is the position of the City that by paying the contract demand for gas required to meet its obligations to its retail customers and for other municipal uses it is entitled to such volumes of gas throughout the year and can use such portion thereof not needed to meet the daily requirements of its retail customers in its power plant. The record also shows that if the City of Hastings is unable to use the volumes of gas available under the contract demand rate schedule for its power plant but must purchase such gas under a separate contract it will increase the cost of gas to the City by approximately $4,600 a month. It is merely seeking the right to use its distribution facilities and operate its system in the manner which all natural gas distributing companies in similar circumstances must do if the domestic load is to be serviced at reasonable rates.

There would be no queston of the City's right to sell gas purchased under the town-border contract to a power plant if such plant were owned by someone other than the City and thereby it could improve its system load factor in the identical manner it desires to do here.

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[6] The City is the ultimate consumer of gas for various minicipal purposes, other than for power plant use, the gas being purchased under the contract demand rate schedule. This fact demonstates the strained and peculiar reach of the Commission's jurisdiction under the majority interpretation.

Indeed several such situations now exist upon the Kansas-Nebraska system where the purchasing utility, which buys the gas on the same resale rate schedule as does the City of Hastings, sells gas to municipally-owned power plants. In such instances the purchasing utilities are able to improve their system load factors and thus achieve economies in the overall cost of gas which redound to the benefit of residents of such municipalities.[7] It seems strange indeed that it is possible for a large number of other municipalities and private utilities to purchase gas from natural-gas companies[8] under filed contract demand rate schedules and use part of the gas in their electric generating plants when not needed by their retail customers but the City of Hastings cannot.

In my opinion, there is a clear showing of disadvantage and prejudice against the community of Hastings through the terms of the applicability clause of Kansas-Nebraska's rate schedule within Section 4(b) of the Natural Gas Act, and an unreasonable difference in rates and service will result.

I agree that the City lacks the power unilaterally to change the terms of the filed rate schedule of Kansas-Nebraska.[9] But that does not foreclose the City's right

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[7] Blue Hill, Nebraska; Red Cloud, Nebraska; Franklin, Nebraska, and York, Nebraska.

[8] Northern Natural Gas Company; Colorado Interstate Gas Company and Natural Gas Pipe Line Company of America.

[9] The majority view, however, makes it perfectly apparent that if companies may rightfully maintain exclusionary clauses in resale rate schedules as it has permitted Kansas-Nebraska to do, it can hardly refuse, as it did in the *Colorado* case, to accept such clauses when filed by other companies.

to protest against it to us, nor does it limit, in the slightest, this Commission's authority to strike a discriminatory clause from such rate schedule when the facts of record prove it to be discriminatory. That is our function and the Commission has acted upon such basis many times.

The majority refers to the recent Court decision re *California Electric Power Company*, supra, and, without stating why, holds that it affords no support for the City's case. In my judgment, the case is clearly in point. In dealing with the California company's claim that the Commission's jurisdiction was limited to that part of the commingled flow of energy which was resold and did not attach to the entire flow the Court stated:

> "Here, as in the *Penn Water* case, the supposed non-jurisdictional part of the energy is indistinguishable at the point of sale from the remainder. Moreover the amount resold is not constant, but fluctuating. The Commission contends that it is not practicable to segregate the jurisdictional from the alleged non-jurisdictional part. It seems clear, although petitioner contends otherwise, that the only mode of segregation would be by separating the two loads and supplying each by an independent transmission line from the point of metering and purchase to the Depot.
>
> "In virtually all sales of power to a public body, such as a municipality, we would suppose that some part of the energy is used by the purchaser for its own purposes, the rest being resold to the consuming public. It would create untold difficulty and confusion if petitioner's argument in respect of severability for rate regulation purposes were to be given countenance." (Page 209)

For the reasons set forth above, I dissent from the majority action.

THOMAS C. BUCHANAN,
Chairman.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	7
Conclusion	18

CITATIONS

Cases:

California Electric Power Co. v. *Federal Power Commission*, 199 F. 2d 206, certiorari denied, 345 U. S. 934 ..... 13, 15

Colorado Interstate Gas Co. v. *Federal Power Commission*, 185 F. 2d 357 ..... 16, 17

Colorado Interstate Gas Co., 8 F. P. C. 313 16

Kansas-Nebraska Natural Gas Co. v. *City of Hastings*, Civil No. 255 (D. Neb.) 10

Panhandle Eastern Pipe Line Co. v. *Michigan Public Service Commission*, 341 U. S. 329 11

Panhandle Eastern Pipe Line Co. v. *Public Service Comm. of Indiana*, 332 U. S. 507 11

Pennsylvania Water & Power Co. v. *Federal Power Comm.*, 343 U. S. 414 15

State Corporation Commission of Kansas v. *Federal Power Commission*, 206 F. 2d 690 certiorari denied, 346 U. S. 922 ..... 13, 14

United States v. *Public Utilities Commission of California*, 345 U. S. 295 ..... 13, 15

Statutes:

Natural Gas Act, 52 Stat. 821, Sec. 1 (b) 15 U. S. C. 717 ..... 2, 11

339186—55——1

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 656

CITY OF HASTINGS, NEBRASKA, PETITIONER

v.

FEDERAL POWER COMMISSION AND KANSAS-NEBRASKA NATURAL GAS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinions in the Federal Power Commission (Pet. App. 34–53) are reported at 98 P. U. R. (N. S.) 1. The opinions in the Court of Appeals (Pet. App. 11–33) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 16, 1954. The petition for a writ of certiorari was filed on March 15, 1955. The jurisdiction of this Court is invoked under

28 U. S. C. 1254 (1) and Section 19 (b) of the Natural Gas Act.

QUESTION PRESENTED

Whether the court below correctly affirmed the Federal Power Commission's finding that, on the facts of record, it was without jurisdiction over a separately identifiable sale of that part of a commingled mass of natural gas which was sold directly for industrial consumption.

STATUTE INVOLVED

Section 1 (b) of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. 717, reads as follows:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

STATEMENT

Petitioner here, the City of Hastings, Nebraska, seeks review of a judgment of the Court of Appeals that affirmed a Federal Power Commission

order dismissing, for lack of jurisdiction, its complaint against Kansas-Nebraska Natural Gas Company, "a natural-gas company" under the Natural Gas Act. The pertinent facts may be summarized as follows:

The Power Plant Contract. For many years petitioner has owned and operated in the City of Hastings, through its Board of Public Works and its Water and Light Department, an electric power generating plant (R. 131–2). Until April 11, 1942, that power plant used coal and oil as boiler fuel, but on that date the City and the Company executed a contract for direct sale of natural gas to the generating plant on an interruptible basis (R. 71–6, 132).[1] Because the Company had no lines inside the City (R. 18), the contract provided that the gas be delivered to the City at a town border station[2] but that the gas be measured at the power plant by means of a metering and regulating station to be installed and maintained by the Company (R. 74). This contract was superseded by later contracts executed on July 1, 1945 (R. 76–80), and on June 18, 1948 (R. 25–38), but insofar as is here pertinent, all of these power plant contracts were identical. Meanwhile, pursuant to negotiations between the

[1] When gas is supplied on an "interruptible basis" the natural gas company has the absolute right to interrupt the supply of natural gas whenever the needs of its "firm" customers so require.

[2] Since this contract was executed other town border stations have been added (R. 15, 19).

City and the Company, a transportation contract was executed on April 12, 1948, providing that, effective from October 1, 1947, the Company was to pay to the City ¾ cents per MCF for transportation of gas sold to the City and carried through the City's lines from the town border station to the generating plant (R. 85–7).

The Resale Contract. Before the City began buying gas for its power plant, the Company had already been selling gas, pursuant to a commodity type town-borders contract[3] dated September 27, 1941, to the Hastings Gas Company, a privately owned utility, for resale and distribution to local consumers (R. 88–91). This 1941 contract contained a provision that:

> Gas used or consumed by Buyer for industrial use shall not be covered by the foregoing schedule but shall be covered by separate agreement [R. 90].

In April, 1942, the City bought the distribution system of the Hastings Gas Company, and on April 13, 1942, took an assignment of the 1941 town border contract (R. 91–2). The City con-

[3] A commodity type rate is based solely on the quantity of gas actually consumed by the purchaser. It differs from a contract demand schedule where the rate is made up of two elements, (1) a commodity charge for the gas actually consumed and (2) a demand charge based on a percentage of the purchaser's peak demand. The demand charge is a fixed amount regardless of the amount of gas actually purchased; it is predicated on the theory that the purchaser should pay for the cost and upkeep of the equipment necessarily maintained by the supplier to meet the purchaser's needs.

tinued to purchase gas from the Company under that 1941 contract until October 1, 1947, when, following a rate survey inaugurated by the Company for reducing its rates, the Company filed with the Commission Rate Schedule G–1, based upon a contract demand rate as well as a reduced commodity rate (R. 93–116). After some dispute over the new contract demand rate, petitioner finally agreed to execute a new town border contract on April 12, 1948, effective October 1, 1947, incorporating the terms of Rate Schedule G–1 (R. 117–122). The new rate schedule contained the following limitation, "This rate schedule * * * shall not apply to gas used or consumed by Utility (or any of its Departments) for industrial purposes" (R. 97).

The Current Dispute. On August 25, 1949, the City undertook to cancel, effective December 1, 1949, its June, 1948, power plant contract (*supra,* p. 3) under a clause of that contract authorizing cancellation by the Buyer upon 90 days' notice if increased costs to the Company should raise the rate above the cost to Buyer of other fuels available (R. 32, 39). The Company disputed the City's authority to cancel (R. 40),[4] but on December 1, 1949, the City's Gas Depart-

[4] The Company contended that no other fuel was available at a lower cost. This contention was upheld by the United States District Court for the District of Nebraska in contract litigation brought by the Company against the City. That case is now on appeal. See fn. 8, p. 10, *infra.*

ment contracted with the Water and Light Department to supply its needs for natural gas as boiler fuel on an interruptible basis out of the gas secured from the Company under the resale contract of April 12, 1948 (R. 42–4). The Company has consistently disputed the City's right to do this because of the exclusionary clause of Rate Schedule G–1 (R. 97), but the City has nevertheless continued to use gas for its power plant and has contended that it could pay for this gas under the resale contract. On April 25, 1950, the City undertook again to cancel, effective July 1, 1950, the power plant contract (R. 81–3) pursuant to another cancellation provision of the contract (R. 37). This was done to insure cancellation should the earlier action be found to have been ineffective. The Company wrote to the City on June 7, 1950, advising that should the City use gas for the power plant after July 1 without an effective contract, the Company would hold it accountable under the terms of the cancelled 1948 contract (R. 84–5).

On September 20, 1950, the City filed a complaint with the Federal Power Commission requesting the Commission to assert jurisdiction over gas sold to the City for the power plant, to approve Rate Schedule G–1 as the proper rate for such sale and to strike the exclusionary clause of Rate Schedule G–1, excluding gas sold for industrial purposes from its coverage (R. 122–128). On October 30, 1950, the Company moved

to dismiss the complaint on the ground that the Commission lacked jurisdiction (R. 130). After oral argument on this issue, the Commission decided that it needed additional facts and therefore ordered full hearings which were held on May 28 and 29, 1952 (R. 131). On February 5, 1953, the Commission, with one dissent, rendered its decision dismissing the complaint for lack of jurisdiction on the ground that the sale of gas for power plant use was an identifiable transaction separate and independent from the sale of gas for resale and therefore a direct sale for consumptive use beyond the Commission's regulatory jurisdiction (R. 129–146; Pet. App. 34–53).[2] On the City's petition for review, the court below, one judge dissenting, affirmed the Commission's action (Pet. App. 11–33).

ARGUMENT

Petitioner in this case seeks further review of the Commission's holding that since the sales of gas to petitioner for its power plant constituted an identifiable transaction, separate and distinct from the sales to petitioner for resale,

[2] The Commission's order is not clear as to whether the complaint was dismissed because the Commission believed it had no jurisdiction to consider the complaint, or whether, having considered it, the Commission decided that it had no jurisdiction to grant the relief requested. The latter seems the more likely basis since a full hearing on the merits was held. However, the difference seems unimportant for purposes of decision of this case.

the power plant gas sales are beyond its regulatory authority. The court below properly affirmed the Commission's action, which is supported by substantial evidence and is fully consistent with the relevant decisions. Accordingly, there is no need for review by this Court.

1. (a) The record evidence clearly supports the Commission's finding that the history of separate rates, negotiations, contracts, etc. made the two sales separate and distinct so "that the parties had effectively established separate rates for separate sales under two separate contracts" (R. 135, Pet. App. 41). The City does not deny that since April 1942, when the Company began selling gas to the City for use in its power plant, and until July 1, 1950 (or December 1, 1949),[6] when the City cancelled its power plant contract, separate negotiations, contracts and rates have existed for the sale of power plant gas fuel and for the sale of gas for resale to local consumers. Nor does it dispute that, between April 1942 and the date on which the power plant contract was cancelled, only the gas sold to it by Kansas-Nebraska for local resale was subject to Commission regulation and that the Natural Gas Act required the filing of only the rate schedule applicable to that sale. Finally, it is conceded that since commencement of the sale of gas to the

[6] Whether that contract was cancelled on December 1, 1949, as the City contends or on July 1, 1950, as the Company contends is immaterial. See *infra*, p. 10, fn. 8.

power plant the volume of gas so used has been accurately measured and recorded separately from the gas used for resale. It is thus plain that, until a few months before the institution of the present proceeding in September, 1950, the sale of power plant gas was separate and distinct from the resale sales.

(b) Petitioner contended below, and the dissenting circuit judge agreed, that despite this earlier separation of the two sales the City's unilateral cancellation of its power plant contract did away with the two separate transactions so that only one contract has existed since that time. Thus, the City argued that when this action was commenced all gas purchased from the Company was under the resale rate schedule and that the City was therefore free to use the gas thus obtained for its power plant.

This argument, however, of necessity, disregards the express limitation of the resale rate schedule to the effect (R. 97):

> This rate schedule shall apply separately to all natural gas delivered by the Company to the Utility * * * for resale * * * *but shall not apply to gas used or consumed by Utility (or any of its Departments) for industrial purposes.* [Italics supplied.][7]

[7] This clause, or one substantially similar, has appeared in all of the City's resale contracts with the Company since April 1942, when they first began doing business with each other.

Plainly, since the gas used in the City's power plant is "used * * * by Utility * * * for industrial purposes," the sale of this gas cannot be subsumed under the resale rate schedule unless, of course, the Company consents thereto. And it is clear that the Company has not so consented. The Company has repeatedly warned the City that any gas used in its power plant could not be paid for under the resale rate schedule, and upon the City's refusal to heed these warnings, the Company instituted litigation to recover for the gas so used on a contractual or quasi-contractual basis. *Kansas-Nebraska Natural Gas Co.* v. *City of Hastings*, D. Neb., Civil Nos. 255, 273.[8] Indeed, the City itself has recognized the continuing force of the exclusion; the very purpose of this proceeding is to obtain Commission assistance in its removal so that the City can use the gas obtained under the resale rate schedule for its power plant. Since the sales of gas for the two different purposes are thus still distinct, separate and independent even after the City's cancellation of the power plant contract, the dis-

[8] On March 8, 1954, after lengthy litigation, the United States District Court for the District of Nebraska found that an implied contract exists in fact between the City and the Company for the power plant gas and has existed since July 1, 1950, when the City cancelled its written contract. The court therefore awarded to the Company damages equal to the value of all gas consumed by the City in its power plant, since July 1, 1950, according to the rate specified in the power plant contract. See *supra*, p. 5, fn. 4; p. 8, fn. 6.

senting judge clearly erred in concluding that "the gas used by the City as fuel in the generating plant * * * is part of a larger quantity nominated by the City for resale" (Pet. App. 31). As stated by the court below, "the exact amount of gas consumed by the power plant is, and throughout the entire history of the dealings between the parties, has been measurable" (Pet. App. 25).

2. The sale of gas for the power plant, being clearly identifiable as an essentially separate and independent transaction from the sale of gas for resale, clearly is not subject to Commission regulations under the Natural Gas Act. Section 1 (b) of the Act, *supra*, p. 2, not only provides for Commission jurisdiction over "the sale in interstate commerce of natural gas for resale," but expressly denies Commission authority over "any other transportation or sale." See, e. g., *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 516–517. Consequently, there can be no doubt that direct sales for consumptive use, as is here involved in the sale of gas for power plant use, are excluded from commission jurisdiction and designedly were left to state regulation. *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission*, 341 U. S. 329, 334.

(a) Despite the clear distinction drawn by the Act between sales for resale and sales for con-

sumptive use,[9] the City nevertheless complains that the Commission should regulate, and establish the rate for, the Company's sale of gas for use in the city-owned-and-operated power plant. If, in the circumstances of this case, this gas had been supplied through a separate "lateral" line leading directly from the Company's main to the power plant, rather than mingled with the other gas, there would be no question that the power plant gas would not have been sold "for resale," that the sale would not have been within the Commission's jurisdiction, and, consequently, that dismissal of the complaint was correct. But the City contends that since the power plant gas arrives at its town border mingled with other gas to be resold to local customers, the result must be different and the Commission has jurisdiction over this power plant gas.[10]

The City's position might have some merit were the commingling of gas complete in all aspects,

[9] In view of this express Congressional mandate, there is no substance to the complaint made by the City and the dissenting Commissioner that the Commission should assert jurisdiction here since, should the City sell the power plant to a third person and thereafter undertake to furnish the needed gas, the Company's sale of such gas to the City would be subject to Commission regulation as a sale for resale.

[10] The only reason why the gas was delivered in a commingled mass was to avoid the economic waste involved in setting up two separate pipelines, one for the power plant gas and one for the resale gas. In this connection, it is noteworthy that the Company has agreed to pay, and has paid, the City ¾ cents per MCF for the use of the City's lines to transport the gas destined for the power plant.

physically, contractually, as well as historically, and indeed this Court has so suggested in a somewhat similar case under the Federal Power Act. In *United States* v. *Public Utilities Commission of California,* 345 U. S. 295, 316–8, this Court referring to the Commission's opinion in the instant case, stated that jurisdiction might turn on "whether an essentially separate transaction covering the power directly consumed by the purchaser is identifiable," i. e., not merely that the amount used for such purpose can be ascertained but that there be "record evidence of separate rates, separate negotiations, separate contracts or separate rate regulation by official bodies, in short that the 'sales' themselves were separate" (345 U. S. at 318). In the *Public Utilities* case there was no such record evidence; however, here the record leaves no doubt as to the presence of the various elements demonstrating the existence of a separate identifiable transaction. See *supra,* pp. 3–5, 8–9.

Nor is the City's position that mere physical commingling of resale gas with the power plant gas automatically gives the Commission jurisdiction over the sale of the entire mass aided in any way by *State Corporation Commission of Kansas* v. *Federal Power Commission,* 206 F. 2d 690 (C. A. 8), certiorari denied, 346 U. S. 922, and *California Electric Power Co.* v. *Federal Power Commission,* 199 F. 2d 206 (C. A. 9), certiorari denied, 345 U. S. 934, on which the City

relied below. While the Court of Appeals in each case held that the Commission had jurisdiction over the entire commingled sale of natural gas or electric energy, though some was sold for resale and some for direct consumptive use, it is significant that in neither case was there a showing of a factually separate transaction such as we have here. Thus, in the *State Corporation* case, the Eighth Circuit, after pointing to the lack, historically, of separate contracts and to the interdependence of the rate schedules for the allegedly separate contracts, expressly distinguished the instant case on the ground that here, unlike the *State Corporation* case, there was a completely separate identifiable transaction (206 F. 2d at 701):

> But in that case [*City of Hastings* v. *Kansas-Nebraska Co.*, FPC opinion No. 244, Feb. 5, 1953] it was expressly found by the Commission that there was a long subsisting contract between the natural gas company involved and the City of Hastings by the terms of which the gas company sold the City the interruptible supply of gas it used itself in the power plant by direct sale to the City for that use. * * *
>
> But in the case at bar, Northern's contracts with its utility customers are like the town border contracts in the *City of Hastings* case. * * *

Moreover, it is noteworthy that the decisions of all these cases are based on practical and

administrative difficulties involved in differentiating between the two uses for jurisdictional purposes, where in fact the two are at most only incompletely separated. In the *Public Utilities* case, this Court in discussing *Penn. Water* v. *Federal Power Commission,* 343 U. S. 414, noted (345 U. S. at 317):

> The impossibility of separating interstate from intrastate electricity consumed by each purchaser is patent. In such a case, federal rate jurisdiction must attach to each distributor's negotiated agreement with the seller irrespective of occasional and unpredictable use of non-jurisdictional instrastate power.

Similarly, in the *California Electric* case, the Ninth Circuit commented (199 F. 2d at 209):

> * * * the supposed non-jurisdictional part of the energy is indistinguishable at the point of sale from the remainder. * * * The Commission contends that it is not practicable to segregate the jurisdictional from the alleged nonjurisdictional part. * * *

Thus, where the two uses are not identifiable into separate and independent transactions, the needs of effective regulation require that they be treated as a unit, subject to Commission regulation as sales for resale. However, where as here, the two are separate and distinct, such practical considerations are absent and, accordingly,

there is no occasion for the Commission to regulate a sale otherwise excluded from its authority.[11]

(b) Relying on *Colorado Interstate Gas Co.*, 8 F. P. C. 313, the City has also urged that the Commission's reference to the history of separate transactions improperly emphasizes the "end-use" of the gas sold and ignores the true nature of the gas when delivered to the City. But Section 1 (b) of the Gas Act, *supra.* p. 2, by limiting the Commission's jurisdiction to sales of natural gas for resale, imposes a duty upon the Commission to inquire into the intended end use of the gas. Only by determining the purpose for which the gas is to be used can the Commission ascer-

[11] Such has been the Commission's consistent view. In its brief filed in 1950 in *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185 F. 2d 357 (C. A. 3), the Commission stated (at pp. 30–31):

"It is apparent that the Commission has consistently refrained from asserting jurisdiction over sales for power plant use where the sales are made under separate contracts.

* * * * *

"The pattern is therefore clear. The Commission, in keeping with the foregoing legislative history, has consistently asserted jurisdiction over the entire sales of gas to wholesale purchasers even when a portion of the gas is used in the purchasers' own power plants, if the sale is made under single contracts and tariffs on file with the Commission and the deliveries are made in bulk without physical separation of volumes going to the plants. And the Commission has not asserted jurisdiction over sales for boiler plants when such sales are made under separate contractual agreements and no tariffs have been filed with the Commission covering them even though the deliveries are made in bulk at one metering point."

tain whether it has jurisdiction over a particular sale.

Moreover, the City's argument is predicated on a misapplication of the *Colorado Interstate* case. In that case, where the natural gas company sought to insert into its resale rate schedule a proviso prohibiting the use for the purchaser's power plant of the gas sold for resale, the Commission refused to permit the addition of the proviso. But in that instance, unlike this one, there had been no prior history of separate transactions, and, indeed, until the company proposed the proviso it had sold the gas to the purchaser in a single commingled mass without any effort to differentiate among end uses. Since the situation in *Colorado Interstate* was thus different from that of the instant case, the Commission's ruling has no application here. Moreover, it is significant that this ruling by the Commission was reversed on appeal. *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 185 F. 2d 357 (C. A. 3).[12]

[12] The third Circuit's holding, that the Commission could not forbid a gas company from including in its resale rate schedule a proviso similar to that here involved, makes it doubtful whether, even if the Commission had jurisdiction, it could grant the relief requested by the City, i. e., that it direct the deletion of the proviso, particularly since the Commission has found the proviso not to be discriminatory (R. 136; Pet. App. p. 42).

CONCLUSION

The Commission's order is supported by substantial evidence and is in accord with the relevant decisions. There is no conflict of decisions, and no need for further review. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1954

No. 656

CITY OF HASTINGS, NEBRASKA, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,
KANSAS-NEBRASKA NATURAL GAS COMPANY, INC., *Intervenor*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR INTERVENOR IN OPPOSITION

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Question Presented	2
Reasons for Denying the Writ	2
Statement of the Case	2
Argument	5
Conclusion	11
Appendix	12

CASES:

Colorado Interstate Gas Co. v. *Federal Power Commission*, 185 F. 2d 357 (3rd Cir. 1950)	7, 8
Panhandle Eastern Pipe Line Co. v. *Public Service Commission of Indiana*, 332 U.S. 507 (1947)	7
United States v. *Public Utilities Commission of California*, 345 U.S. 295 (1953)	8

STATUTE:

Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*	2, 3, 6

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BRIEF FOR INTERVENOR IN OPPOSITION

OPINIONS BELOW

The Opinion and Order of the Respondent, Federal Power Commission (Petition, Appendix, pp. 11-33), is reported at 12 FPC 3, and 98 P.U.R. (N.S.) 1. The opinion of the United States Court of Appeals for the District of Columbia Circuit and the dissenting opinion (Petition, Appendix, pp. 34-53), have not yet been reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTE INVOLVED

The statute involved is the Natural Gas Act (Act of June 21, 1938, ch. 556, 52 Stat. 821, as amended by Act of February 7, 1942, ch. 49, 56 Stat. 83, and Act of July 25, 1947, ch. 333, 61 Stat. 459, 15 U.S.C. §§ 717 *et seq.*) principally Section 1(b) of that Act, set forth in the Petition at page 2.

QUESTION PRESENTED

Whether the Court below erred in refusing to set aside the determination of the Federal Power Commission that it had no jurisdiction, on the facts presented, over the sale by Kansas-Nebraska Natural Gas Company, Inc., to the City of Hastings, Nebraska, of gas for consumption by the City in the City's own electrical generating plant because it was a separately identifiable direct sale to the consumer for its own use rather than a sale for resale.

REASONS FOR DENYING THE WRIT

This Court should decline to issue a writ of certiorari because: (1) There is no conflict between the decision of the Court of Appeals in this case and the decisions of any other Courts of Appeals or of the Supreme Court; (2) This case involves no important Federal question; and (3) On the merits, the issues involved in this case were correctly determined by the Federal Power Commission and the Court of Appeals.

STATEMENT OF THE CASE

In view of "the decisive importance of the physical facts and the historical arrangement among the parties" (Petition, Appendix, p. 35), the Federal Power Commission (the Commission) and the Court of Appeals described the facts

of this case in substantial detail. Respondent relies on those descriptions for a more detailed statement than is given here or in the course of its Argument.

Kansas-Nebaska Natural Gas Company (Kansas-Nebraska) is a "natural gas company" within the meaning of the Natural Gas Act (the Act). It makes two types of interstate sales: *direct sales* to numerous industrial *consumers* for their own consumption and sales to *distributors* for *resale* to ultimate consumers, which are regulated by the Federal Power Commission. The City of Hastings, Nebraska (the City) is both a *distributor* and a *consumer* or *direct user*.

All of Kansas-Nebraska's sales to *distributors* for *re-sale*, including the sales for re-sale to the City, are governed by a single Rate Schedule G-1, filed with the Commission (Joint Appendix, p. 93). All of Kansas-Nebraska's sales to industrial consumers, including its *direct sales* to the City for use in its own power plant, are made pursuant to separate direct sale contracts. The direct sale contract with the City provides the same terms and rates as the direct sale contracts in effect between Kansas-Nebraska and every other similar industrial consumer within the State of Nebraska. (Intervenor's Appendix, pp. 12-13).

In operational and legal fact, Kansas-Nebraska and the City have always dealt separately with the gas purchased for re-sale and the gas purchased by the City for use in its own power plant. As found by the Commission, for over 10 years, substantial quantities of power plant gas have been separately treated for rate purposes, separately negotiated and contracted for, separately measured and separately billed. Since 1948, Kansas-Nebraska has paid the City a transportation charge for carrying the power plant gas from the point of delivery through the City's lines to the power plant.

Prior to the instant dispute, there was never any question about the fact that the direct sales for the power plant were not subject to the Commission's jurisdiction. There

has never been, and is not now, any question about the fact that the gas purchased by the City for re-sale is subject to the Commission's jurisdiction, which is still being effectively exercised.

The present dispute arose after Kansas-Nebraska adopted, following a preference stated by the Commission, (Intervenor's Appendix, p. 12) a contract demand type of arrangement[1] with all of its distributors, including the City, *on its sales for re-sale.* The coverage of the contract demand rate schedule was made precise for all of Kansas-Nebraska's *re-sale* customers by a specific provision in the rate schedule that it did "not apply to gas used or consumed by Utility [the City] for industrial purposes." (Joint Appendix, p. 97).

The City opposed the adoption of the contract demand arrangement. After the Commission permitted this type of rate schedule to become effective, the City signed the contract demand type of sale for re-sale contract and, thereafter, a separate contract for the gas used in the power plant, as it had always previously done.

Still later, the City exercised its right to terminate the direct sale contract.[2] Since that termination, the City has continued to take gas from Kansas-Nebraska for use in its power plant, with full knowledge of Kansas-Nebraska's advice to the City that gas for the power plant could be purchased only on the terms of the pre-existing separate power plant contract (Joint Appendix, pp. 83-85). The City contends, notwithstanding this advice and notwith-

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[1] Generally speaking, the contract demand type of arrangement obligates the supplier to have available at all times facilities adequate to supply a stated amount of gas, the amount being based on a study of the purchaser's probable maximum *firm* needs under extreme climatic conditions. For this service and investment by the supplier, the purchaser pays a fixed fee plus an additional fee for the gas actually used.

[2] Kansas-Nebraska contends that an attempted termination prior to July 1, 1950 was ineffective. The precise date of effective termination is not material for the purposes of this Petition.

standing the specific language in the rate schedule excluding gas sold directly to the City for use in its own power plant, that all of the gas taken by it for the power plant since the termination of the seprate power plant contract has been purchased under the re-sale contract and is therefore subject to the Commission's jurisdiction.

In collateral litigation, the United States District Court for the District of Nebraska has determined, as a matter of contract law, that the City is liable to Kansas-Nebraska for all power plant gas taken after termination of the power plant contract, according to the terms of that contract. This decision is now pending on appeal before the United States Court of Appeals for the Eighth Circuit.

ARGUMENT

I

There is No Conflict of Decision

The City does not claim that the decision below is in conflict with the decisions of any other Court of Appeals on the same matter or is in conflict with applicable decisions of this Court. No such assertion could be made.

As pointed out in the majority opinion of the Court below (Petition, Appendix, pp. 23-26), there is no conflict among the circuit courts and the Commission's determination is in accord with criteria found in decisions of this Court.

II

There is No Important Question of Federal Law

The Order of the Commission, affirmed by the Court below, applies only to the particular facts in this case, i.e., the long history of separate negotiations, separate contractual arrangements and obligations, separate measurement and consumption, separate payment and the complete independence of the direct sale for power plant use from the sale for re-sale—as these circumstances have existed

for more than a decade between Kansas-Nebraska and the City. The Commission took care to point out in its opinion that these particular facts constituted "the distinguishing circumstances here," and further noted that the methods used here in separating the sale of the power plant gas in no way precluded or interfered with the Commission's exercise of its rate authority over the sale for re-sale of the distribution system gas.[3] (Petition, Appendix, p. 43). Such authority is effectively exercised today. Therefore, the decision of the Court below does not involve a definition or interpretation of *general* application under Section 1(b) of the Act. Accordingly, there is no important question of Federal law requiring decision by this Court.

Contrary to the City's contention, the decision below does not give countenance to any so-called "end-use" theory (allegedly rejected "on other occasions") that "retroactively" affects the Commission's jurisdiction after completion of the sale. The Commission, on substantial evidence, found that the power plant gas was the subject of a separate direct sale to the consumer, and was not gas sold originally under a re-sale contract and subsequently devoted to power plant uses. (See, especially, Petition, Appendix, pp. 41-43.) The dissenting judge ignored the Commission's findings in this respect. (Petition, Appendix, p. 31).

III

The Commission's Determination as Affirmed by the Court Below Was Correct

The Natural Gas Act confers regulatory authority on the Federal Power Commission over "the sale in interstate commerce of natural gas *for resale for ultimate public consumption* for domestic, commercial, industrial, or any other use" and specially provides that the Act *"shall not apply to any other . . . sale of natural gas. . . ."* (Emphasis sup-

[3] The Petition's unsupported assertion (p. 8) of findings of jurisdiction upon "substantially" identical facts in other cases ignores the separability of the direct sales found to exist in this case.

plied). "Direct sales for consumptive use of whatever sort were excluded" from the Commission's power to regulate. *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana,* 332 U.S. 507 (1947).

In a case of this nature the ultimate question is whether particular sales in a particular factual setting are sales "for resale" or whether they are sales for direct consumption by the purchaser. *Colorado Interstate Gas Co.* v. *Federal Power Commission,* 185 F. 2d 357 (3rd Cir. 1950). The Commission, the expert body entrusted by Congress with the authority to make this decision in the first instance, has determined that on the particular facts of this case Kansas-Nebraska's sales to the City of gas for use in its own power plant were direct sales and are not sales "for resale." The Court of Appeals has affirmed the Commission's findings and conclusions.

Kansas-Nebraska submits that even if the Commission's experience and ability were disregarded, the Commission's decision would be affirmed on the merits.

On the particular facts of this case, the Commission correctly found and concluded that gas sold by Kansas-Nebraska to the City for use in its own power plant is and historically has been sold separate and distinct from gas sold to the City for resale. For ten years prior to the present dispute, Kansas-Nebraska regularly sold to the City for its own use in its power plant substantial quantities of gas. At the same time, and always under separate negotiations, contracts, rates, billings and measurement, Kansas-Nebraska sold gas to the City as a distributor, which the City resold through its distribution lines to the ultimate consumer. The resale and the direct sale gas have only one point in common: both the resale and direct sale gas arrive commingled at a town border station where delivery is made to the City. Kansas-Nebraska pays to the City a transportation charge for transporting the power plant gas in the City's mains from the town border station to the plant. No such charge is paid on account of the resale gas. The power plant gas is separately metered on meters in-

stalled and maintained by Kansas-Nebraska at the power plant for that purpose. (Joint Appendix, p. 74).

Mere physical commingling at the point of delivery does not, contrary to the City's contention, make all sales—both direct and resale—sales for resale where there is a long history of substantial and separate sales for direct consumption, where the quantities of such consumption are easily and separately measured and where the parties have always regarded such sales as being governed by separate contractual arrangements. Physical commingling is material, if ever, only where the Commission cannot exercise its regulatory authority over the quantity of gas sold for resale without at the same time exercising its authority over the sale of all the gas delivered in bulk, where the operational arrangements prevent any practical separation or measurement of the direct sales, and where the buyer and seller treat *all* the gas delivered as part of the sale for resale. These are not the facts in this case.[4]

Even the dissenting judge apparently conceded the validity of this jurisdictional distinction between direct and resale gas (Petition, Appendix, pp. 32-3), and acknowledged that "as an engineering proposition 'accurate measurement of the volume resold and the volume directly consumed . . . is possible for each billing period.'" (Petition, Appendix,

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[4] In *United States* v. *Public Utilities Commission of California*, 345 U.S. 295 (1953), this Court declined to rule that mere physical commingling brought all sales within the Commission's jurisdiction. While the Court also refused to hold, on the record before it, that the direct and resale uses involved therein were separable, it indicated that on an appropriate record it would consider relevant such things as separate measurability of volume, separate rates, negotiations and contracts. *Id.* at p. 318. All of these factors are present in the instant case.

In *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 185 F. 2d 357 (3rd Cir. 1950), the Court unanimously held the Commission to be without power to compel Colorado Interstate to file a single rate schedule covering all of its gas sales to intervenors where part of the gas sold was used in intervenors' own power plants. The Court pointed out that if the gas so consumed was not in fact the subject of a sale for resale, the Commission would lack the power to regulate its sale. The record in the *Colorado Interstate* case did not permit a resolution of that question.

p. 32). He argued, however, as does the City, that since July 1, 1950, when the City terminated the direct sale contract, "the only contractual arrangement under which Kansas-Nebraska has supplied Natural Gas to the City" is the resale gas contract. (Petition, Appendix, p. 29).

This erroneous conclusion of the dissent is based on several incorrect factual and legal premises.

First, Kansas-Nebraska has never agreed, prior or subsequent to July 1, 1950, to furnish gas to the City for power plant purposes under the resale contract. It has consistently advised the City that any gas used for the power plant was available solely under and on the terms of the direct sale contract explicitly in effect prior to July 1, 1950. By continuing, among other things, to take and use gas knowing of Kansas-Nebraska's offer, the City has continued in effect the terms of the direct sales contract. In collateral litigation, this point has been determined in Kansas-Nebraska's favor as a matter of contract law by the United States District Court for the District of Nebraska. An appeal from that judgment is now pending before the United States Court of Appeals for the Eighth Circuit.

Second, the dissenting judge and the City argue that the contract demand type of arrangement which prevails between the City and Kansas-Nebraska (and all of its other distributors) on resale gas gives the City the right to take resale gas for use in its power plant at least, apparently, up to an amount which, when added to the City's resale gas equals the amount nominated by the City under the contract demand agreement.

This argument contradicts, however, the specific provision in the resale rate schedule, and contract for the gas for resale, still in effect, that:

> "This rate schedule . . . shall not apply to gas used or consumed by Utility [the City] (or any of its Departments) for industrial purposes."

Even if contract demand gas may be taken for interruptible uses generally (such as the power plant) it cannot be taken for an interruptible use (such as the power plant) specifically prohibited by the contract demand rate schedule and contract.

The purpose of a contract demand arrangement is to assure the purchaser enough gas to meet the emergency needs of its *firm* re-sale customers. As the City says in its Petition, the volume nominated in the contract demand is "based solely upon the needs of [its] firm gas customers" without any allowance whatsoever for the requirements of interruptible users. (Petition, p. 6). Thus the contract demand arrangement does not permit the City to purchase on every day *or on any day* it chooses up to the total amount of the contract demand beyond the requirements of its *firm* resale customers.[5]

In summary, the petition for a writ of certiorari should be denied because the Commission has correctly found and concluded, on the facts of this case, that Kansas-Nebraska's sales to the City for *direct consumption* in its power plant are separate and distinct from Kansas-Nebraska's sales to the City for *resale* to the consuming public.

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[5] The dissenting judge premised his argument in part upon two additional factual errors: (1) The change from a straight commodity form of rate to the contract demand type of contract was "insisted upon by Kansas-Nebraska." (Petition, Appendix, pp. 29, 33) In fact, the contract demand form was adopted pursuant to a preference expressed by the Commission. (Intervenor's Appendix, p. 12) (2) Since July 1, 1950, "all gas supplied by Kansas-Nebraska to the City has been within the amount the City was required to nominate as probably needed for its firm resale customers." (Petition, Appendix, pp. 29-30) The fact is that on at least two occasions the total gas taken by the City, including the power plant gas, substantially exceeded the nomination under the contract demand (see Item 18 of Stipulations, Joint Appendix, p. 18).

CONCLUSION

For the foregoing reasons, the petition for the writ of certiorari should be denied.

Respectfully submitted,

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Q. Before we go on, did the staff prefer the contract demand form the contract?[1] A. They so indicated.[2]

Q. And did you prepare it, based upon that case? A. I did.

Chief Presiding Examiner: Indicated in what way? Did they say so?

The Witness: I am sorry, sir——

Chief Presiding Examiner: You say the staff indicated something. My question is how did they indicate it, did they say so?

The Witness: They said so, yes, sir.

By Mr. Conway:

Q. By using the word "indicated," you mean to say for the record that they said so? A. They said so, and I might expand that a little bit more, as to the way in which they said so. They gave reasons for preferring that form of rate. They pointed out that they were at that time engaged in similar discussions with another company, the particular company happened to be Northern Natural Gas Company, operating in the adjacent area, and Northern Natural's rate was being revised at that time from the so-called base load excess gas form of rate to the demand and commodity form of rate, somewhat—well, I will have to get into what the staff indicated, it was their suggestion that Northern Natural was adopting that form of rate, and they wanted us to see what we could do. (Excerpt from Transcript of Record, pp. 240-241).

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Chief Presiding Examiner: I wondered, if you want to show that you have not discriminated, I hesitate to exclude

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[1] By Mr. Conway, for Kansas-Nebraska.

[2] By Mr. Ransom, for Kansas-Nebraska.

that, but I wondered if you couldn't show it in some more general and less detailed way by this witness, whatever you have to show.

Mr. Conway: Your Honor, maybe counsel would stipulate.[1]

Mr. Marti: Tell us what you would like to stipulate to.[2]

Mr. Conway: I will make a brief statement, to stipulate to the fact that the city of Hastings power plant has always enjoyed the lowest available rate to industrial customers served by Kansas-Nebraska in the State of Nebraska.

Mr. Marti: Now, as I understand it, the witness has testified that the only three steam plants you serve are Hastings, Grand Island and Riverside?

Mr. Conway: That is correct.

Mr. Marti: I am willing to stipulate, if it is a fact, and I will take your word for it being a fact, that the rate Kansas-Nebraska has always tried to charge Hastings is the same rate that they have charged for gas used at the Grand Island Power Plant, and at the Riverside power plant.

Mr. Conway: Will you stipulate further that those are the lowest industrial rates in existence offered by Kansas-Nebraska to any industrial customer?

Mr. Marti: Direct industrial customer, yes. I will so stipulate. (Excerpt from Transcript of Record, pp. 291-292).

* * * * * * * * *

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[1] For Kansas-Nebraska.

[2] For City of Hastings.